89-989

Supreme Court, U.S.
FILED
DEC 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS,
BRENT & CHAPPELL
1200 Mutual Building
909 East Main Street
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
OFFICE OF THE CITY ATTORNEY
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

This case presents several related questions about the meaning of Section 2 of the Voting Rights Act, as interpreted in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and its application to at-large electoral systems:

1. In considering the issue of "legally significant racially polarized voting" (*Gingles*) to determine whether black voters have an equal opportunity to elect "representatives of their choice" within the meaning of Section 2, may a court of appeals require, as a matter of law, proof of usual success in achieving proportional representation, even though Section 2 expressly states that it does not grant a right to proportional representation?

2. In determining whether black voters are being denied an equal opportunity to elect "representatives of their choice," may a court of appeals conclude, as a matter of law (and by adopting a legal presumption), that an elected candidate who receives a majority of black votes and the endorsement of the leading black political organization in a multi-seat election is not a representative of black voters' choice merely because another candidate with more black votes loses?

3. Under what conditions may a court of appeals determine, as a matter of law, that an elected representative of choice of black voters must not be counted among black electoral successes because of the "special circumstances" (*Gingles*) that the representative was elected after suit was brought or was elected as an incumbent?

4. Did the court of appeals in this case disregard this Court's ruling in *Gingles* that a district court's "totality of the circumstances" determination regarding the presence or absence of vote dilution may be reversed only if it is clearly erroneous?

LIST OF PARTIES

The petitioners, who were defendants in the action below, are the City of Norfolk, Virginia, a municipal corporation; Vincent J. Thomas, Mayor, Dr. Mason C. Andrews, Joseph A. Leafe, Rev. Joseph N. Green, Jr., Claude J. Staylor, Jr., Robert E. Summers, and Mrs. Elizabeth M. Howell, in their official capacity as members of the Norfolk City Council at the time of suit; the City of Norfolk Electoral Board; and Paul D. Fraim, Martha H. Boone, and Paul M. Lipkin, in their official capacity as members of the City of Norfolk Electoral Board at the time of suit. The respondents, who were plaintiffs in the action below, are Herbert M. Collins, Dr. H. Marks S. Richard, Barbara C. Parham, William E. Swindell, Jr., Dr. Milton A. Reid, Julian Hazel, George Banks, and the Norfolk Branch, National Association for the Advancement of Colored People.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE AND RULE INVOLVED	2
STATEMENT OF THE CASE	2
1. Background	3
2. This Lawsuit	6
3. The District Court's Second Opinion	7
4. The Court of Appeals' Decision	10
REASONS FOR GRANTING THE WRIT	14
I. The Court Of Appeals Erroneously Held That Ability To Fill The Proportional Seat (With A Black Candidate) Was The Necessary Measure Of Black Electoral Success	17
II. The Court Of Appeals Relied On An Incorrect View Of Who Counts As A "Representative Of Choice" Of Minority Voters In At-Large, Multi-Seat Elections	23
III. The Court Of Appeals Erroneously Discounted Several Black Electoral Successes As Insignificant Because Of "Special Circumstances"	26
IV. The Court Of Appeals Failed To Address The District Court's "Totality Of The Circumstances" Determination And To Give The District Court's Findings Proper Deference	28
CONCLUSION	29

TABLE OF AUTHORITIES

Cases Page

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 27
Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977) 18
Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989) .. 17
Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1111 (1988) 16, 17, 22
Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S. Ct. 3213 (1989) 15, 17, 22, 24
Dove v. Moore, 539 F.2d 1152 (8th Cir. 1976) 18, 20, 21
Fortson v. Dorsey, 379 U.S. 433 (1965) 20, 21
Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1534 (1989) .. 17
Overton v. City of Austin, No. A-84-CA-189 (W.D. Tex. Sept. 15, 1987), *aff'd*, 871 F.2d 529 (5th Cir. 1989) 27
Sanchez v. Bond, 875 F.2d 1488 (1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989) ..... *passim*
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*
Whitcomb v. Chavis, 403 U.S. 124 (1971) 18, 20, 21
Williams v. State Bd. of Elections, 718 F. Supp. 1324 (N.D. Ill. 1989) 25

Statutes and Rule

Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973 ..... *passim*
28 U.S.C. § 1254(1) 2
Rule 52(a), Fed. R. Civ. P. 28

Miscellaneous

A. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987) 21
Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1 (1982) 21, 25

TABLE OF AUTHORITIES—Continued

Page

Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353 (1976) 21

Int'l City Mgt. Ass'n, The Municipal Year Book, 1989 16

M. Schellinger, *Today's Local Policy Makers: A Council Profile Baseline Data Report, Vol 20, No. 4* (Int'l City Mgt. Ass'n, July/August 1988) 16

S. Rep. 417, 97th Cong., 2d Sess. (1982) ..... *passim*

Voting Rights Act: Hearings on S.53, et al. Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The City of Norfolk, Virginia, together with the members of the Norfolk City Council and the City of Norfolk Electoral Board and its members, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (*Collins VI*, Pet. App. 1a-37a) are reported at 883 F.2d 1232. The opinion of the district court (*Collins V*, Pet. App. 38a-98a) reversed by the court of appeals is reported at 679 F.Supp. 557. The initial decision of the district court (*Collins I*, Pet. App. 132a-193a) is reported at 605 F.Supp. 377. The opinions of the court of appeals affirming that decision (*Collins II*, Pet. App. 114a-131a) and following this Court's remand (*Collins IV*, Pet. App. 99a-112a) are reported, respectively, at 768 F.2d 572 and 816 F.2d 932.

JURISDICTION

The court of appeals entered judgment on August 18, 1989. Pet. App. 194a-195a. On October 3, 1989, a petition for panel rehearing was denied by a vote of 2 to 1, and the court of appeals determined, by a vote of 5 to 5, not to rehear the matter en banc. Pet. App. 196a-197a (corrected order superseding initial rehearing denial dated Sept. 27, 1989). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

The pertinent parts of Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, and of Rule 52(a), Fed. R. Civ. P., are reprinted at Pet. App. 198a-200a.

STATEMENT OF THE CASE

Respondents brought suit alleging that the at-large system for electing the members of the Norfolk City Council violates the Constitution and Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973. The district court rejected the constitutional as well as statutory challenges. With respect to the latter, the court held that Norfolk's black voters had no "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" (42 U.S.C. § 1973) to the Norfolk City Council. It based that holding on extensive factual findings that respondents had failed to establish any of the identified factors suggesting a Section 2 violation (*see Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986); S. Rep. 417, 97th Cong., 2d Sess. 28-29 (1982); Pet. App. 5a-6a n.3) and that in Norfolk, judging from a history of 10 elections over two decades, "black-preferred candidates usually win, and . . . white bloc voting does not usually defeat the black voters' preferred candidates." Pet. App. 57a. A divided court of appeals reversed, finding liability under Section 2. The court of appeals found a violation as a matter of law based solely on its view of black voters' lack of sufficient electoral success—

particularly, on its view that black voters had not usually been able to achieve proportional representation, a conclusion reached by discounting the election of both black and white candidates who received majority black support and black political sponsorship.

1. *Background.* The district court's findings describe the electoral success that black voters in Norfolk—who made up 24.07% of the voting age population in 1970 and 31.48% in 1980, and whose registration and voting rates are higher than those of Norfolk's white population (Pet. App. 146a-147a)—have had in electing "representatives of their choice" to the seven-member City Council.[1] From 1968 to 1986, the candidates who received a majority of black voter support have usually been elected: 11 of 19 (58%) such candidates won. *Id.* at 66a-67a. During the same period, black voters' first choice candidate was elected in 7 out of 10 elections (70%), and either the first or second choice was elected in every such election. *Id.* at 208a-217a.[2] At the same time, more than half (8 of 14, or 54%) of all *black* candidates who received a majority of black support have been elected. *Ibid.*[3] This string of electoral successes, as

---

[1] The City Council has seven members, each of whom serves for four years. The terms are staggered, and elections are held every two years. Voters may vote for as many candidates as there are seats open, though they may cast votes for fewer than that number. The candidates with the most votes win; there is no absolute-majority requirement, and there are no run-off elections. Pet. App. 3a-4a, 42a.

[2] The district court's findings were based on the 10 elections from 1968 to 1986, in every one of which black candidates vied for seats on the City Council. Pet. App. 59a. In 1988, following entry of the district court's judgment, black candidate John Foster was reelected with a majority of the votes in 53 of 54 precincts, stretching the success rate to 8 of 11 elections (72.7%) in 20 years. The court of appeals took judicial notice of the 1988 results. *Id.* at 20a, 201a, 202a.

[3] The success rate for *all* black candidates, whether or not they were supported by a majority of black voters, was 30.4%, slightly better than the white success rate of 29.2%. Pet. App. 59a.

shown on the following table, was achieved in crowded multi-candidate fields, which included at least twice as many white candidates as available seats and one or more black candidates running in each election. *See* Pet. App. 56a, 202a-217a (showing 1968-1988 election results).

TABLE OF NORFOLK CITY COUNCIL ELECTION RESULTS FOR ALL CANDIDATES WHO RECEIVED MORE THAN 50 PERCENT OF THE VOTES OF BLACK VOTERS, 1968-1986

Year	Name	Result	% Black Vote	Rank
1968	Jordan	*Elected*	91.9%	1st
1970	Walton	Defeated	92.4%	
1972	Jordan	*Elected*	98.3%	1st
1974	Bond	Defeated	73.4%	
	Howell (W)	*Elected*	58.2%	2nd
	Staylor (W)	*Elected*	56.5%	3rd
1976	Jordan	*Elected*	97.3%	1st
	Hill (W)	Defeated	76.3%	
	Hurst (W)	Defeated	75.6%	
1978	Green	*Elected*	96.1%	1st
	Howell (W)	*Elected*	68.5%	2nd
1980	Butts	Defeated	92.9%	
	Howell (W)	*Elected*	72.9%	2nd
1982	Green	*Elected*	88.2%	1st
	Butts	Defeated	87.6%	
1984	Foster	*Elected*	79.9%	1st
	Butts	Defeated	72.1%	
1986	Green	*Elected*	90.3%	1st
	Harris	Defeated	84.1%	

(W)—Indicates white candidates; all others are black.

Summary: 11 of 19 (58%) black-preferred candidates have won through 1986 (12 of 20 including 1988); 7 of 13 (54%) *black* black-preferred candidates have won through 1986 (8 of 14 including 1988); the first choice among black-preferred candidates has won in 7 out of 10 elections (8 of 11 including 1988).

Source: Pet. App. 208a-217a (Def. Ex. 470). (For 1988, see Pet. App. 202a-207a.) The "% Black Vote" uses Norfolk's statistics, as did the court of appeals. Pet. App. 9a.

A similar picture of electoral success is revealed by examining the results of endorsement by major black political organizations in Norfolk City Council elections. From 1972 to 1986, the candidates supported by the Concerned Citizens of Norfolk ("Concerned Citizens")—which was found by the district court and recognized by the court of appeals to be the paramount black endorsement group since 1972 (Pet. App. 72a-73a, 119a)—have won 60% of the time (15 of 25 candidacies). In the three elections from 1984 through 1988, another major black endorsement group, the Rainbow Coalition, succeeded in electing eight of its nine endorsed candidates, including three of four black candidates. *Id.* at 74a, 202a-207a.

The result of those voting patterns is that, for more than two decades, candidates supported by a majority of black voters have served on the City Council. From 1968 to 1974, there was one City Council member (Jordan), or 14%, who had been elected with a majority of black support. From 1974 to 1978, the City Council had three members (Jordan/Green,[4] Howell, and Staylor), or 43%, elected with a majority of black support. From 1978 to the present, the City Council has had two such members (Green and Howell from 1978 to 1984, and Green and Foster thereafter), or 29%. In short, since 1974 there have been at all times at least two City Council members (29%) and, for four of those years, three members (43%) supported by a majority of black voters in their most recent election.[5]

---

[4] Jordan resigned in 1977 to become a judge and was replaced by Rev. Green.

[5] As for the race of the members, the City Council had one black member from 1968 to 1984 (Jordan, then Green) and has had two black members since 1984 (Green and Foster). Those members were among the representatives supported by a majority of black voters. Like them, the other such representatives (Howell, Staylor, both white) not only were elected with majority black support but were

2. *This Lawsuit.* Respondents filed this action in 1983, seeking to replace Norfolk's at-large election system with a ward system—the wards, or single-member districts, to be drawn so that a number of them (based on the black proportion of the population) would have a majority of black voters. Respondents challenged the at-large system under the 1982 version of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as well as under the Fourteenth and Fifteenth Amendments, on the ground that the system unlawfully dilutes black voting strength. In support of their Section 2 vote-dilution claim, respondents alleged the applicability of every single factor that was identified as relevant by the key 1982 Senate Committee Report, S. Rep. 417, 97th Cong., 2d Sess. 28-29 (1982), and subsequently relied on by this Court in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986).

After a 10-day bench trial, the district court rejected respondents' claims, finding in a lengthy opinion that the evidence did not support any of those claims. Pet. App. 133a-193a (*Collins I*). The court of appeals affirmed in a 2-1 decision. *Id.* at 114a-131a (*Collins II*). This Court subsequently vacated the judgment and remanded for reconsideration in light of the intervening decision in *Thornburg v. Gingles, supra.* Pet. App. 113a (*Collins III*); *see* 478 U.S. 1016 (1986). The court of appeals, in turn, remanded the case to the district court for reconsideration in light of *Gingles.* Pet. App. 99a-112a (*Collins IV*).[6]

---

endorsed by Concerned Citizens and defeated black candidates among black voters.

Judge Jordan served as Vice Mayor from 1972 to 1977, and Rev. Green has served in that post since 1982. *See* Pet. App. 163a.

[6] By the time of that remand, the majority of the Senate Report factors previously challenged—as to which the district court found against respondents—were no longer in issue. Accordingly, since that stage of the litigation, it has not been disputed that (1) there is no history of official discrimination in the State or in Norfolk

The remand by the court of appeals in substance focused on whether black voters have been denied the ability to elect the "representatives of their choice" because a sufficiently cohesive white voting bloc is "*usually* . . . able to defeat candidates supported by a politically cohesive, geographically insular minority group," *Gingles*, 478 U.S. at 49 (setting forth necessary preconditions of a Section 2 vote-dilution claim). Pet. App. 99a-113a.[7] The court of appeals required the district court, in evaluating black voters' electoral successes, to apply a legal presumption that a candidate who has received a majority of black voters' support is *not* a representative of their choice if another candidate has received more black votes but lost. *Id.* at 108a. That presumption, which was rebuttable, was to apply even in elections, as in Norfolk, where several seats are open and, therefore, where there could be (as there was here) more than one candidate of choice.

3. *The District Court's Second Opinion.* On remand, the district court, in another lengthy opinion that considered the "totality of the circumstances," found that re-

---

that now touches the right of Norfolk's black citizens to register, to vote, or otherwise to participate in the democratic process; (2) Norfolk does not have unusually large election districts, majority vote requirements, anti-single shot provisions or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (3) Norfolk's black citizens do not bear the effects of discrimination in such areas as education, employment, and health in any way that currently hinders their ability to participate effectively in the political process; (4) political campaigns in Norfolk have not been characterized by overt or subtle racial appeals; and (5) the existence of the at-large system in Norfolk, which dates back to 1918, is not the result of a tenuous state or local policy. Pet. App. 42a.

[7] Specifically, the district court was instructed to inquire into "Racially Polarized Voting" (or "legally significant racially polarized voting," *Gingles*, 478 U.S. at 56) and "Minority Electoral Success." Pet. App. 104a, 106a. The district court also was directed to consider whether there was any discrimination in the construction of candidate slates and whether certain acts showed a lack of responsiveness to minority concerns. *Id.* at 110a-111a.

spondents had failed to prove "structural [vote] dilution" (*Gingles*, 478 U.S. at 51). The principal reason was that the white population of Norfolk had not in fact voted "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" (*ibid.*). Pet. App. 39a-98a (*Collins V*).

In rejecting respondents' claim that there had been too few black electoral victories,[8] the district court followed the three-step analysis set forth by this Court in *Gingles*, 478 U.S. at 50-51. The court found the presence of the first two preconditions of a vote dilution claim seeking a ward system: (1) that Norfolk's black voters are geographically situated so that a ward system would create two "safe" seats (leaving few black voters in the more numerous remaining wards);[9] and (2) Norfolk's black voters are politically cohesive, in that they commonly vote in large numbers for the same candidates. Pet. App. 51a-52a. The court found, however, that the third necessary precondition of the vote dilution claim was missing: "Norfolk's whites do not vote sufficiently as a bloc that they usually defeat the minority's preferred candidate." *Id.* at 52a. To the contrary, the court found that in Norfolk, unlike the districts in *Gingles*, not only is there no "usual predictability" (478 U.S. at 51) of defeat for black-preferred candidates, but the usual course is success: "the white cross-over vote has combined with the black vote to elect the black-preferred candidates *most of the time*." Pet. App. 55a (emphasis added). In support of that finding, the court noted the consistent level of

---

[8] The district court reaffirmed its earlier findings, which had not been disturbed on appeal, under which the absence of virtually all of the Senate Report factors was now settled. Pet. App. 42a; *see also id.* at 47a-49a (contrasting facts here with facts in *Gingles*). It also found no legally significant racially polarized voting, no lack of responsiveness, and no discriminatory slating process. *Id.* at 49a-57a, 85a-97a.

[9] In this regard, the district court found: "It is doubtful that establishing a ward system would produce a greater black presence on Norfolk's City Council than is already there." Pet. App. 52a.

substantial white crossover voting for candidates supported by a majority of black voters (Pet. App. 55a-56a)[10] and found—as set forth in more detail above (pp. 3-5, *supra*)—that, from 1968 through 1986, black-preferred candidates with the help of a consistent level of white crossover votes have *usually won*. Pet. App. 66a-67a.[11]

The district court rejected each of respondents' several arguments for not counting certain elected black-preferred candidates (the effect of which would be to reduce the level of significant black electoral success). With respect to Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974—both of whom were elected with majority black support and the endorsement of the major black political organization—the district court found that both were in fact representatives of black voters' choice. Pet. App. 70a-71a.[12] With respect to the 1984 election of Rev.

---

[10] White crossover voting averaged 25% for black-preferred candidates from 1968 to 1986. Pet. App. 56a. That level of support is greater than the white support received by more than half of the white candidates. *Ibid.* In fact, white voter support for black-preferred candidates has frequently been higher than 25%—*e.g.*, 38% for Mrs. Howell and 66% for Mr. Staylor in 1974; 32% for Rev. Green in 1978; 31% for Mrs. Howell in 1980; 31% for Rev. Green in 1982. *See* Pet. App. 209a-211a, 213a.

[11] The court noted that, although the 66% white population could win every seat if it voted as a bloc, white-preferred candidates between 1968 and 1986 won only 25 of 38 seats, or 66%. Similarly, black-preferred candidates during the same period won 11 of 38 seats, or 29%. Both figures are, of course, roughly equivalent to population proportions. Pet. App. 66a-67a.

[12] This finding rebutted the presumption announced in the court of appeals' remand order that they did not have that status because in each of these elections another candidate received more black votes but lost. The district court found the court of appeals' presumption rebutted by the clear evidence of black support, both numerical and testimonial. Pet. App. 70a-71a. For example, Mrs. Howell won 58% of the black votes in 1974 and 73% in 1980. (In 1978, she received 68% black support and was the second choice of black voters, who elected their first choice as well.) She defeated black candidates among black voters in both 1974 and 1980 (in-

Foster, the district court found that it counted as a black electoral success, finding for a second time that there was no evidence that Rev. Foster's election was somehow orchestrated by white leaders to moot this lawsuit (*see* Pet. App. 77a; *see also id.* at 163a-164a (first district court opinion), 117a & n.3 (Fourth Circuit upholding that finding)) and that there was "no evidence of unusual white voting patterns in the 1984 election." *Id.* at 77a.[13]

Having concluded that there was no legally significant racially polarized voting, the district court also considered—in accordance with this Court's decision in *Gingles*, 478 U.S. at 77—whether black representation has been so nearly proportional as to preclude relief even if legally significant racially polarized voting had been found. The court found that black representation has been essentially proportional—either two (29%) or three (43%) seats on the City Council since 1974. That representation was as close to proportional as in *Gingles*' District 23, as to which this Court reversed a finding of liability. Pet. App. 83a-85a.

4. *The Court of Appeals' Decision.* a. A divided panel of the court of appeals reversed, holding that the at-large

---

cluding respondent Banks) and received Concerned Citizens' endorsement in both years. Mr. Staylor, in 1974, received 56% of the black vote, ahead of three black candidates (including respondent Reid). As to confirming testimony, see Pet. App. 70a-71a (Virginia House of Delegates member Robinson); Tr. 55 (respondent Banks); Collins Dep. 15 (respondent Collins); Parham Dep. 56, 84-85 (respondent Parham).

[13] Respondents argued that *every* successful black candidate in the last 20 years has won due to "special circumstances." Pet. App. 74a-75a (emphasis added). The court rejected all of those claims. *Id.* at 74a-82a. With respect to respondents' claim that the reelection of incumbents should not count, the court found that the fact "[t]hat some of the winners were incumbents does not negate the overall pattern of black success." *Id.* at 80a. Indeed, the court pointed out that "the re-election rate of black incumbents is 100 percent, which is greater than that of whites." *Ibid.*

election system used for 71 years in one of Virginia's most populous cities must be abolished and ward lines drawn. Pet. App. 1a-22a (*Collins VI*). The court concluded, contrary to the district court's findings, that respondents had established that whites in Norfolk "vote sufficiently as a bloc usually to defeat the minority's preferred candidates" (*Gingles*, 478 U.S. at 56). Pet. App. 8a, 9a. The court of appeals reached that conclusion based on its view of who counts as "representatives of [black voters'] choice" (Section 2) and of what black electoral successes should be disregarded in the analysis.

First, the court rejected the district court's findings that Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974 were representatives of choice for black voters. Pet. App. 9a-15a. Following its presumption that they were not "representatives of [black voters'] choice" because they were not the "most preferred" candidates of black voters (*i.e.*, in each case another candidate received more black votes but lost), the court of appeals held that the presumption had not been rebutted. *Id.* at 10a-11a. The court discounted Concerned Citizens' endorsement and declared "immaterial" the fact that both Mrs. Howell and Mr. Staylor defeated other black candidates. *Id.* at 11a. Instead, what the court considered "critical" was "the difference between the black support for the candidate who received the most black votes yet lost and for the candidates who won with fewer black votes." *Ibid.* The court also considered significant selected testimony concerning Mrs. Howell's and Mr. Staylor's substantive views in 1984. *Id.* at 12a-13a. For those reasons, the court concluded, Mrs. Howell's victories in 1974 and 1980 and Mr. Staylor's victory in 1974 could not properly be counted as occasions when black voters elected "representatives of their choice."

The court further discounted black voters' electoral successes—dismissing as insignificant the statistics showing overall black candidate success in 7 of the 10 elections between 1968 and 1986—by reformulating the test to be

applied in judging relevant electoral successes. Pet. App. 15a-16a. The court ruled that the proper subject of inquiry was not black voters' overall ability to elect their preferred candidates, but their ability to fill a second seat on the City Council, *i.e.*, the proportional seat. *Id.* at 15a. *See also id.* at 2a ("The principal issue is whether [respondents] have less opportunity than other members of the electorate to elect *more than one councilman* as the 'representatives of their choice.'") (emphasis added). Even more narrowly, the court suggested that the proper focus was the ability to fill that proportional seat with a *black* candidate (*id.* at 15a), although it had previously noted the conclusion of a plurality in *Gingles* that the candidates' race was irrelevant (Pet. App. 8a n.7). The court noted that a second black member was not elected until 1984. Moreover, the court of appeals concluded that "regardless of the race of the candidate[,] the black community, prior to the institution of this suit, could not elect a second representative of their choice" (*id.* at 16a), a conclusion that the court presumably thought followed from its earlier decision to disregard the election of Mrs. Howell in 1974 and 1980 and of Mr. Staylor in 1974.[14]

The court took two additional steps to shrink the ranks of black voters' electoral successes. First, it decided to disregard, as aberrational due to "special circumstances," the 1984 election of Rev. Foster, a black candidate who won with 80% black voter support and the endorsement of Concerned Citizens. Pet. App. 17a-20a. To do so, the court had to reverse as clearly erroneous the district court's finding that there was no unusual white voting pattern for Rev. Foster.[15] Second, the court of appeals

---

[14] The court of appeals simply ignored the fact that, in 1978, black voters did elect their two most-preferred candidates to the City Council—Rev. Green and Mrs. Howell. *See* Pet. App. 211a.

[15] The principal basis for the court of appeals' ruling was its view of which other elections were properly compared to the 1984 election. Following its earlier exclusive focus on the ability to fill the proportional seat, the court of appeals rejected the district

ruled that incumbency was a "special circumstance" that diminished the significance of various black electoral victories. Pet. App. 20a-21a. In addition to suggesting that Rev. Green's appointment to office in 1977 had "little bearing on the black community's ability to elect a second representative" except when he ran as an incumbent after 1984, the court concluded more generally that "incumbency was a significant factor in black electoral success." *Id.* at 20a.[16] The incumbents' victories in 1986 and 1988, the court concluded, "coupled with the pendency of this action and the manifest desire to moot it as evidenced by the 1984 election," was not enough to "negate the existence of the white bloc voting" that it had already found by winnowing down the field of electoral successes in the previous parts of its opinion. *Id.* at 21a.[17] Based on those findings, the court of appeals directed the district court to enjoin at-large elections and to require creation of a new election system. *Id.* at 22a.

b. Judge Chapman dissented from the panel's judgment and from each of its rulings. Pet. App. 22a-37a. First, he explained that, contrary to the panel's view, a "representative of choice" under Section 2 cannot be limited, in multi-seat elections, just to the candidate who

---

court's examination of all elections involving black candidates and instead compared the 1984 election only to those elections in which a second black candidate received majority black support but lost. Pet. App. 18a. Again focusing on the race of the candidate (and therefore ignoring Mrs. Howell's 1978 victory, *see* note 14, *supra*), the court asserted that Rev. Foster's 26.6% white vote was greater than that received by any previous black candidate for a second seat. Pet. App. 19a. The court also relied on the Mayor's endorsement of Rev. Foster in disregarding the 1984 election.

[16] Without further explaining why incumbents' reelection diminished black voters' ability to elect representatives of their choice, the court observed that whereas "[n]o black incumbent was ever defeated," from 1968 to 1986 "with two exceptions . . . no black candidate who was not an incumbent was elected." Pet. App. 20a.

[17] The court of appeals left undisturbed the district court's finding that there was no discriminatory slating process and no lack of responsiveness. Pet. App. 21a.

receives the most minority votes. He further reasoned that the panel's reliance on Mrs. Howell's and Mr. Staylor's substantive views was improper because it establishes "a litmus test for the political beliefs of minority preferred candidates." *Id.* at 23a-29a. Judge Chapman also disagreed with the panel's adoption of the view that "the correct legal test for bloc voting is whether the majority votes sufficiently as a bloc to usually defeat candidates *for a proportional seat.*" *Id.* at 30a. He explained that this "new and sweeping rule" (*ibid.*) effectively "establishes a right of proportionality" (*id.* at 32a) under which "[a]ny at-large system, which does not usually produce proportional representation, is now illegal" (*id.* at 33a)—a rule plainly contrary to Section 2's express denial of any right to proportional representation. *Id.* at 31a-34a.[18]

c. A petition for panel rehearing was subsequently denied by a 2-1 vote, and a suggestion for rehearing en banc was denied by a vote of 5 to 5. The court of appeals granted a stay pending the timely filing of a petition for a writ of certiorari. Pet. App. 196a-197a.

REASONS FOR GRANTING THE WRIT

This case presents important questions about the proper application of Section 2 of the Voting Rights Act. Since 1974, in Norfolk, it has been more the rule than the exception that candidates supported by a majority of black

---

[18] With respect to the panel's rejection of Rev. Foster's 1984 victory, Judge Chapman pointed out that the panel's ruling rested on the erroneous exclusive focus on black voters' ability to fill a second seat. Judge Chapman added that the panel's ruling on the 1984 election in any event fell of its own weight, because another black candidate not supported by the Mayor received white support comparable to that received by Rev. Foster. Hence, the levels of white support for Rev. Foster were not attributable to the actions of Norfolk's white political leaders. *Id.* at 34a-36a. Judge Chapman also disagreed with the panel's view that incumbency somehow diminished the significance of black electoral successes, explaining that, given the universal importance of incumbency in American political life, the panel's view "would make practically every American election a 'special circumstance.'" *Id.* at 36a-37a.

voters have been elected to the City Council. During that time, "the white cross-over vote has combined with the black vote to elect the black-preferred candidates *most of the time.*" Pet. App. 55a (emphasis added). As a result, in a city with a black voting age population of between 24 and 32 percent, at least two (and sometimes three) members of the seven-member council have been elected with majority black support in their last election. Finding those facts, and applying the principles of *Thornburg v. Gingles*, the district court found that the at-large system of elections in Norfolk did not dilute black voting power.

The Fourth Circuit, in finding a Section 2 violation, took a radically different view. To begin with, although the Voting Rights Act explicitly disclaims any intent to confer a right to proportional representation,[19] the court of appeals held that the necessary inquiry under Section 2 is not the overall ability of blacks to elect "representatives of their choice" over time, but their ability to elect representatives (in this case, two) in proportion to their percentage of the voting population. Moreover, contrary to the views of the Fifth Circuit, the court applied a novel, and extremely narrow, definition of the statutory term "representatives of their choice," concluding that candidates with majority black support are presumed *not* to be "representatives of [black voters'] choice" whenever an unsuccessful candidate gets more black votes. *Compare* Pet. App. 108a *with Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), *cert. denied*, 109 S. Ct. 3213 (1989) (in a multiple seat election, the minority will necessarily have more than one preferred candidate). The practical effect of those rulings, taken together, is to condemn any at-large voting

---

[19] "*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

system that does not invariably, or almost invariably, produce the same results as voting by separate districts.[20]

The approach taken by the Fourth Circuit is a serious departure from the principles set out in Section 2 and in the opinion of this Court in *Thornburg v. Gingles*. It is simply incorrect to say that the focus of inquiry under Section 2 should be on voters' ability to elect the number of representatives corresponding to their percentage of the voting age population. It is likewise incorrect to hold that candidates with majority support from particular voters are nonetheless presumed not to be "representatives of their choice." Were this the law, it would be virtually impossible for any jurisdiction to maintain an at-large voting system, thus invalidating by far the most common system used in municipalities throughout the United States.[21] The questions raised by the decision below are thus of widespread significance, and review by this Court is warranted.[22]

---

[20] As discussed below (pp. 22, 26-29, *infra*), the court also committed errors in its conclusions that the 1984 election and the reelection of incumbents were "special circumstances," in its treatment of the district court's factual findings, and its reliance on the race of candidates in measuring relevant black electoral successes. The last of those errors conflicts with decisions of the Tenth and Eleventh Circuits, *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1111 (1988).

[21] According to a 1986 survey of several thousand cities, more than 88% of cities employ either pure at-large systems (64.0%) or mixed systems (24.3%). M. Schellinger, *Today's Local Policy Makers: A Council Profile Baseline Data Report, Vol. 20, No. 4*, at Table 3 (Int'l City Mgt. Ass'n, July/August 1988). *See also* Int'l City Mgt. Ass'n, *The Municipal Year Book, 1989* at 63 (54.5% of counties in survey employ at-large or mixed systems for election of county commissions).

[22] In none of the other Section 2 cases that have come before this Court since *Gingles* has the district court found in the jurisdiction's favor with respect to every one of the Senate Report factors and been reversed by the court of appeals. Moreover, in none of

I. The Court Of Appeals Erroneously Held That Ability To Fill The Proportional Seat (With A Black Candidate) Was The Necessary Measure Of Black Electoral Success.

The court of appeals set out on the wrong foot in this case by saying that "[t]he principal issue" turned on the ability of black voters to fill a second (*i.e.*, proportional) seat on the Council. Pet. App. 2a. Rather than look at overall election results in Norfolk, the court said that it was concerned specifically with whether black voters were able to fill that second seat with a black candidate. *Id.* at 15a.[23] With or without the limitation to black candidates, that standard for measuring black electoral successes is incompatible with Section 2.

The decision to insist on success in filling two of seven Council seats is nothing more than a decision to require usual proportional representation. *See* Pet. App. 33a (Chapman, J., dissenting) (majority opinion "does not merely creep up to the notion of proportionality, it embraces it"). But Congress, in the statute itself, emphatically rejected the notion of proportional representation.

---

the four petitions since *Gingles* that have sought review of rulings against at-large systems under Section 2 had *any* minority group member been elected to the political body challenged. *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S. Ct. 3213 (1989); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989); *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1534 (1989); *Carrollton Branch of NAACP v. Stallings*, *supra*. In *Sanchez v. Bond*, *supra* (cert. pet'n pending, No. 89-353), the Tenth Circuit affirmed a district court determination that there was no legally significant racially polarized voting and no Section 2 violation based in part on the successful elections of minority-supported white candidates.

[23] In so doing, the court of appeals deemed of only "superficial" significance the facts that black candidates have been elected in 7 of 10 elections from 1968 to 1986 and that, during the same period, 7 of 13 black candidates (54%) who received at least 70% black support have won. Pet. App. 15a.

42 U.S.C. § 1973(b); *see Gingles*, 478 U.S. at 46 (even "the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation"). And the third step of vote-dilution analysis, as this Court ruled in *Gingles*, is simply whether white bloc voting has usually defeated the black-preferred candidates. 478 U.S. at 51. That inquiry is in no way targeted at, or limited to, defeats for a proportional seat.

Congress did not write into Section 2 an express denial of a right to proportional representation only to have the courts introduce a requirement that an election system achieve proportional representation most of the time. To the contrary, Congress rejected the entire concept of proportional representation in favor of a standard of equal access (*see* S. Rep. 417, *supra*, at 16, 193-94), a standard that plainly does not require "usual" proportional representation. Indeed, such a requirement would negate the Senate Report's multi-factor approach, with its emphasis on a searching, functional inquiry into the full set of circumstances surrounding a jurisdiction's electoral history. *See* S. Rep. 417, *supra*, at 28-30. Moreover, the Senate Report, in explaining the 1982 version of Section 2, relied on various decisions that had rejected vote-dilution challenges to systems that had never produced proportional representation. *See* S. Rep. 417, *supra*, at 32, 33 (relying on, *e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Black Voters v. McDonough*, 565 F.2d 1 (1st Cir. 1977); *Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1976)).

As this case readily shows, the problem with an emphasis on achieving proportional representation is that it may well miss the forest for the trees. Black voters in Norfolk simply are not being frozen out of the normal political processes by which groups achieve electoral representation despite being a minority of the voting population. Not only are black registration and voting rates higher than those of whites, but there is a consistent and

substantial level of white crossover voting for candidates supported by a majority of black voters. Indeed, "[t]he white cross-over vote has combined with the black vote to elect the black-preferred candidates most of the time." Pet. App. 55a. The candidates endorsed by the major black political organization have consistently been elected. And none of the other Senate Report factors indicating a denial of equal access to electoral processes is present. *See* pp. 6-7, *supra*.[24]

Unlike the Fourth Circuit, this Court in *Gingles* did not require that elections be looked at seat-by-seat to determine whether black voters can elect a certain number of representatives; rather, it defined the proper inquiry as whether white bloc voting over time has "usually" defeated the candidates supported by a politically cohesive black voting bloc. 478 U.S. at 51.[25] Here, not only have most black-preferred candidates been elected, but that has resulted because of white crossover voting. Moreover, since 1974 there have been at least two and at times three (out of seven) members of the City Council who not only ran with the leading black political organization's endorsements but were elected with a majority of black

---

[24] Of course, as *Gingles* explained (478 U.S. at 56-57 & n.25), the significance of a particular level of crossover voting varies according to a number of factors, such as the presence of majority vote requirements, designated posts, or prohibitions against single-shot voting (none of which exists in Norfolk), the registration rates of minority voters (in Norfolk, black registration is higher than white registration), the number of candidates running (all Norfolk elections have had crowded fields), and the number of elections in which the minority group has sponsored candidates (black voters have sponsored candidates in all Norfolk elections since 1972). The situation in *Gingles* itself was quite different from the situation here. *See* 478 U.S. at 38-42, 58-61, 81-82.

[25] Thus, the Court in *Gingles* explained that "legally significant racially polarized voting" requires "a white bloc that normally will defeat the combined strength of minority support plus white 'crossover' votes." 478 U.S. at 56.

voters' support.[26] Furthermore, notwithstanding the greater number of white voters in Norfolk, the significant electoral influence of black voters has led to the election of some candidates less preferred by whites over candidates substantially more preferred by whites.[27] This picture is not the sort of white bloc voting or black vote dilution that Section 2 is meant to condemn.

"Multimember districts and at-large election schemes . . . are not *per se* violative of minority voters' rights." *Gingles*, 478 U.S. at 46, 48; *see* S. Rep. 417, *supra*, at 16.[28] Although at-large systems are subject to abuse, it has long been recognized that they may serve important political values unavailable in racially defined ward systems that isolate most black voters in a few districts and leave most districts with no appreciable black constituency. At-large systems, for example, may make it more likely that all officeholders have city-wide perspectives on

---

[26] Hence, even if respondents had proved that black-preferred candidates were usually defeated, Norfolk would still prevail under *Gingles*' separate defense based on proportional representation. 478 U.S. at 77.

[27] For example, in 1968, Judge Jordan, with 28.7% of the white vote, defeated a white incumbent (Schweitzer) who had 63.7% white support. In 1978, both Mrs. Howell, with 26.6% of the white vote, and Rev. Green, with 32.2% of the white vote, defeated a white candidate (Middleton) who had 64.1% white support. In 1980, Mrs. Howell, with 31.7% of the white vote, defeated white candidate Phillips, who had 56.3% white support. And in 1986, Rev. Green, with 27.3% of the white vote, defeated candidate Wright, who had 60.3% white support. Several other candidates have lost to candidates with less white support. *See* Pet. App. 208a-217a.

[28] Prior to the 1982 amendments, this Court and other courts had upheld multi-member-district systems in cases (*e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971); *Fortson v. Dorsey*, 379 U.S. 433 (1965); *Dove v. Moore*, 539 F.2d 1152 (8th Cir. 1976)) that the 1982 Congress expressly relied on as setting the proper standard for claims under the amended Section 2 (*see* S. Rep. 417, *supra*, at 33).

issues; reduce the patronage and other problems of ward-heeling; make *more* of the officeholders actually beholden to and therefore responsive to black voters; make it much more costly for politicians simply to write off minority voters' interests (as can be done in a ward system where minority voters are not among the constituents in the non-black wards); diminish rather than accentuate racial allegiances and divisions; and nourish a sense of common citizenship rather than separatism.[29] Congress thus decided to permit local jurisdictions to choose those electoral values over competing ones, unless minority voters are systematically denied access to electoral representation by being frozen out of the normal processes by which numerical minorities make their voices heard in a democracy. *See* S. Rep. 417, *supra*, at 193-94 (statement of Sen. Dole); *Whitcomb v. Chavis*, 403 U.S. at 153-55. The Fourth Circuit, by focusing on the need to achieve pro-

---

[29] *See, e.g., Whitcomb v. Chavis*, 403 U.S. at 142 n.22; *id.* at 157 n.38 (citing studies); *Fortson v. Dorsey*, 379 U.S. at 438; *Dove v. Moore*, 539 F.2d at 1155 n.4; Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 45 (1982) (relied on in *Gingles*); Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353, 359 (1976) (relied on in *Gingles*). A number of these points were made by witnesses in the 1982 Senate hearings and underlie the resulting congressional decision to ensure, through express statutory language, against reading Section 2 to require proportional representation. *See Voting Rights Act: Hearings on S. 53, et al. Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1310, 1330, 1361, 1449 (1982) (testimony of Professors William Van Alstyne, Donald Horowitz, and James Blumstein); A. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* 124 (1987) (general study of Voting Rights Act).

Judge Jordan, the first black member of Norfolk's City Council, made what is perhaps the central point about the values that may be served by an at-large system in his testimony at the trial in this case: "How does it help the black community to limit itself to two predominantly black wards and be of no consequence in the remainder of the community?" Tr. 1527.

portional representation, has largely read that congressional decision out of the statute.

The approach taken by the court of appeals is all the more troubling because it seems to incorporate the notion that black voters must achieve proportional representation with *black* candidates. In *Gingles*, this Court left unresolved the question of when, if ever, the race of candidates may be taken into account in a vote-dilution case. Four Justices concluded that the race of the candidate is irrelevant to vote-dilution analysis. 478 U.S. at 68. Justice White expressed the view that race would be relevant under some circumstances (*id.* at 83), and four Justices did not express a view on what circumstances, if any, would justify considering the race of the candidate (*id.* at 101) (O'Connor, J., concurring). No Justice suggested, as the Fourth Circuit did in this case, that a finding of vote dilution could be premised on a count of electoral successes that disregarded white candidates supported by a black majority. Among lower federal courts, the Eleventh Circuit has embraced the *Gingles* plurality view that the candidates' race is irrelevant to the analysis (*Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (1987), *cert. denied*, 108 S. Ct. 1111 (1988)), while the Tenth Circuit, in affirming the rejection of a vote-dilution claim, has relied on the election of white candidates as the representatives of Hispanic voters' choice (*Sanchez v. Bond*, 875 F.2d 1488 (1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989)).[30] The issue is unquestionably one on which further guidance from this Court is needed.

---

[30] *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d at 502 (treating successful white candidates as representatives of choice even though a black candidate lost).

II. The Court Of Appeals Relied On An Incorrect View Of Who Counts As A "Representative Of Choice" Of Minority Voters In At-Large, Multi-Seat Elections.

The court of appeals not only narrowed the test for finding a violation of Section 2 in impermissible fashion; it also took far too restricted a view of what candidates supported by black voters can be considered "representatives of their choice." The court adopted a presumption—not embraced by any other court—that candidates who receive a majority of black votes are not "representatives of [black voters'] choice" so long as another candidate receives more black votes but loses. Pet. App. 10a-11a, 108a. The court then effectively turned that presumption into a legal definition when it held, as a matter of law, that Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974 were not representatives of choice of Norfolk's black voters—even though the district court had found to the contrary and they won substantial majorities of the black votes, were endorsed by the leading black political organization, and defeated black candidates among black voters. *Id.* at 11a-13a.[31]

The court's view of who counts as "representatives of choice"—aside from conflating the two separate issues of who are the candidates of choice and how often they have won—makes little sense. In any election like Norfolk's,

---

[31] This ruling affects two stages of the *Gingles* framework. First, it alters the analysis of whether black voters' representatives of choice have usually been defeated. It does not, however, alter the result, for, as Judge Chapman pointed out, even without considering Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974, the candidates supported by a majority of black voters won half the time between 1968 and 1986. Pet. App. 30a. Second, the court's disregard of Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974 affects the analysis of the *Gingles* proportional-representation defense. Even without considering those Council members, however, black-preferred candidates filled two seats on the Council between 1978 and 1980 and from 1984 to the present. As discussed below (pp. 26-28, *infra*), the court of appeals also eliminated from consideration the minority electoral successes in 1984 and thereafter.

where multiple seats are open and minority voters can and do participate fully in the selection of candidates for all of those seats, minority voters necessarily will have more than one candidate of choice.[32] Nothing in the "equal opportunity" policy of Section 2, moreover, supports a construction that effectively entitles black voters to elect any candidate who receives more votes than another candidate who receives a majority of black support but also has broader (cross-racial) appeal and therefore wins. Rather, any candidate who receives a majority of black support is properly considered a "representative" of black voters' choice, at least if, examining all of the circumstances (including endorsements by black political organizations), the district court does not find for some scund reason that the candidate was not among those affirmatively supported by black voters.

The Fifth Circuit has taken a view of who counts as a representative of choice contrary to that of the Fourth Circuit here, treating *all* of the three black-preferred candidates for three open seats as candidates of choice for purposes of vote-dilution analysis. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d at 502 ("In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate."). The United States, in its brief to

---

[32] An unsuccessful candidate receiving more black voters' votes, of course, counts as a "representative[ ] of their choice" as well. But in determining whether bloc voting usually defeats candidates supported by black voters, a court should not regard the unsuccessful candidates as the *only* representatives of choice and simply disregard other candidates with substantial black support. Thus, Mrs. Howell and Mr. Staylor were representatives of black voters' choice in 1974 and 1980, as were Lenious Bond in 1974 and Evelyn Butts in 1980. The defeats of the latter two were clearly counted by the district court in its assessment of whether black-preferred candidates have "usually" been defeated (by white bloc voting). *See* Pet. App. 56a, 67a, 68a. The court of appeals was simply wrong in stating that the district court treated Howell and Staylor as the representatives of black voters' choice "rather than" Bond and Butts. Pet. App. 10a.

this Court on the petition for a writ of certiorari in that case, expressly agreed with that position. Brief for the United States As Amicus Curiae in No. 88-597, at 11. *See also Williams v. State Bd. of Elections*, 718 F. Supp. 1324, 1328 n.8 (N.D. Ill. 1989) (counting all candidates supported by a majority of black voters). The third-ranked black-supported candidate in a three-seat election counts as a representative of black voters' choice when that candidate wins (as here) just as when that candidate loses (as in *Gretna*), and there is no reason why the conclusion should change depending on how the first two ranked candidates fare. Indeed, the Fourth Circuit's view leads to the nonsensical conclusion that Mrs. Howell was not a candidate of black voters' choice in 1980, when she received 73% of the black vote, but was a candidate of choice in 1978, when she received only 68% of the black vote. *See* Pet. App. 24a-25a, 210a-211a.

The court of appeals compounded its error with respect to Mrs. Howell and Mr. Staylor by discounting the significance of their endorsement by Concerned Citizens. *See* Pet. App. 11a. Endorsement by a leading black political organization obviously supports a finding that a candidate who receives a majority of black voters' votes is a "representative of their choice." Indeed, sponsorship was relied on by the Tenth Circuit in *Sanchez v. Bond*, 875 F.2d at 1496. *See Gingles*, 478 U.S. at 57 n.25 (noting importance of black sponsorship of candidates).[33] And the court of appeals' reliance on the substantive views of

---

[33] From 1972 through the district court's decision in 1988, no candidate received a majority of the black vote without Concerned Citizens' endorsement. Pet. App. 208a-217a; Pretrial Stip. ¶ 55; 1986 Stip. ¶ 3. Four of respondents and their counsel, Mr. Gay, ran for public office in Norfolk; none received Concerned Citizens' endorsement; and none received more than about one-third black voter support. Pet. App. 72a-73a.

See Sanchez, 875 F.2d at 1496 (affirming finding that white candidates sponsored by Hispanic-controlled Democratic Party were candidates of Hispanics' choice); Blacksher and Menefee, *supra*, at 59-60.

Mrs. Howell and Mr. Staylor in 1984 (*see* Pet. App. 12a-13a)—as a basis for discrediting them as representatives of black voters' choice—introduces a wholly unjustified element into the statutory definition. As Judge Chapman concluded, "a litmus test" for ideologically correct beliefs has no place in Section 2 analysis. *Cf. Gingles*, 478 U.S. at 63 (plurality opinion) ("the reasons black and white voters vote differently have no relevance to the central inquiry of § 2").

III. The Court Of Appeals Erroneously Discounted Several Black Electoral Successes As Insignificant Because Of "Special Circumstances."

Although the points previously discussed provided the core of its decision, the court of appeals went on to discount several other electoral successes as the products of "special circumstances."[34] Here, again, the court went too far.

First, the court concluded that the 1984 election of Rev. Foster should not be counted, primarily because his election occurred after the lawsuit was filed and the court believed that he received unusual levels of white support. Pet. App. 17a-20a. But that conclusion rests chiefly on the incorrect view that, in judging whether Rev. Foster received unusual white support, the only proper basis of comparison was the white support given *black* candidates vying for a *second* Council seat in other elections. *See* Pet. App. 19a. That view, of course, is based on the same

---

[34] The court of appeals had to eliminate these additional elections from the calculus in an attempt to shore up its ruling reversing the district court. First, unless the elections since 1984 were discounted, respondents could not show "usual" defeat of black-preferred candidates, even without considering Mrs. Howell in 1974 and 1980 and Mr. Staylor in 1974. Second, the *Gingles* proportional-representation defense should still apply, even without considering the excluded 1974 and 1980 Howell and Staylor victories, because two black-preferred Council members sat between 1978 and 1980 and from 1984 to the present. *See* note 31, *supra*.

notion of proportional representation that guided the more general measurement of black electoral successes. And, although the court stated in passing that it believed there was a scheme of white leaders to moot this case, the district court had found to the contrary, the court of appeals had previously upheld that finding, and there was no new basis for reaching a different conclusion. *See* p. 10, *supra*. To declare that finding clearly erroneous, for no better reasons than those relied on by the court of appeals, wrongly displaces the district court from its proper fact-finding role. *See Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

Second, the court concluded that incumbency was a "special circumstance" that required discounting the successes of black incumbents. Pet. App. 20a-21a; *see Gingles*, 478 U.S. at 57, 60. But the district court in this case had considered the possible effects of incumbency and had found nothing aberrational about the reelection of black incumbents. In stark contrast to the situation in *Gingles*, where the district court concluded that the reelection of a few incumbents could not change the overall conclusion that black-supported candidates usually lost (478 U.S. at 60), here the district court found that black-supported candidates (both incumbents and non-incumbents) have usually won—indeed, have won in eight straight elections through 1988. In any event, "it is difficult to see why the fact of incumbency . . . denigrates continued success." *Overton v. City of Austin*, No. A-84-CA-189 (W.D. Tex. Sept. 15, 1987), *aff'd*, 871 F.2d 529 (5th Cir. 1989); *see also Sanchez v. Bond*, 875 F.2d at 1494 (deferring to district court finding that unopposed candidates should be counted in vote-dilution analysis). Indeed, the 100% black reelection rate, together with the fact that the white reelection rate is slightly lower chiefly because of black-supported candidates' defeat of white incumbents (*see* Pet. App. 208a-217a), would seem to show in this respect at least that black voters have a greater, not lesser, ability to elect representatives

of their choice. Finally, as Judge Chapman pointed out, if incumbency leads to discounting electoral successes, there would be few electoral successes to count in any American election. Pet. App. 36a.

IV. The Court Of Appeals Failed To Address The District Court's "Totality Of The Circumstances" Determination And To Give The District Court's Findings Proper Deference.

The court of appeals also erred in reversing the district court's ultimate finding that there was no unlawful vote dilution simply on the basis of its conclusion that respondents had "satisfied the tripartite test set forth in *Gingles*." Pet. App. 21a. *Gingles* ruled that the three requirements of geographic compactness, minority bloc voting, and usual defeat by white bloc voting were "necessary," not sufficient, conditions (478 U.S. at 50-51) for a violation. *See Sanchez v. Bond*, 875 F.2d at 1492. The Court in *Gingles* rejected any rigid approach like that taken by the court of appeals in this case, making clear that the Section 2 inquiry involves a multi-factor approach, with the district court undertaking a "searching practical evaluation of the past and present reality" of the jurisdiction's electoral politics, taking a "functional view of the political process" and applying "a flexible, fact-intensive test," with the ultimate finding regarding vote dilution committed to the judgment of the district court unless it is clearly erroneous. 478 U.S. at 45-46, 79-80 (internal quotation marks omitted, relying on S. Rep. 417, *supra*, at 30, and Fed. R. Civ. P. 52(a)). *See also id.* at 79 ("the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law").

The district court in the present case followed the *Gingles* approach and found that there was no vote dilution. Yet the court of appeals simply failed to address the district court's overall "totality of the circumstances"

finding. That failure, together with the court of appeals' repeated refusals to give adequate deference to the district court's findings (detailed above), improperly displaced the role of the district court as established in *Gingles*.

CONCLUSION

This is the first post-*Gingles* case to come to this Court that involves a court of appeals' finding of a Section 2 violation in the face of a contrary district court finding and of 20 years of minority electoral successes. If that ruling is correct, then all at-large election systems are imperilled. That result is contrary to Section 2 and should be prevented.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
1200 Mutual Building
909 East Main Street
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
OFFICE OF THE CITY ATTORNEY
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

* Counsel of Record

89-989

No. 89-___

Supreme Court, U.S.
FILED
DEC 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, *et al.*,

Petitioners,

v.

HERBERT M. COLLINS, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN, & FARR
2550 M Street, N.W.
Washington, D.C. 20037
202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
1200 Mutual Building
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
Office of the City Attorney
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

Attorneys for Petitioners
City of Norfolk, *et al.*

* *Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

Appendix	Page
A. Opinion of Court of Appeals - August 18, 1989 (*Collins* VI)	1a
B. Opinion and Judgment of District Court - February 3, 1988 (*Collins* V)	38a
C. Opinion of Remand of Court of Appeals - April 9, 1987 (*Collins* IV)	99a
D. Order of Remand from Supreme Court - July 7, 1986 (*Collins* III)	113a
E. Opinion of Court of Appeals - July 22, 1985 (*Collins* II)	114a
F. Opinion and Judgment of District Court - July 17, 1984 (*Collins* I)	132a
G. Judgment of Court of Appeals - August 18, 1989	194a
H. Corrected Order of Court of Appeals Denying Rehearing and Suggestion for Rehearing in banc and Granting Motion to Stay - October 3, 1989	196a
I. Section 2 of the Voting Rights Act of 1965, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205 § 3, 96 Stat. 131, 134, 42 U.S.C. § 1973 (1982)	198a
J. Federal Rule of Civil Procedure 52(a)	199a
K. Order of Court of Appeals Granting Appellees' Motion to File Addendum with 1988 election results - December 6, 1988	201a
L. Abstract of Norfolk City Council Election - May 10, 1988	202a
M. Defendants' Ex. 470 - Percentage of Votes Received By Candidates in Racially Homogeneous Precincts - 1968-1984	208a
N. Stipulation of Facts, Table A - 1986 Norfolk City Council Election Results	217a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-3950

HERBERT M. COLLINS; H. MARKS S. RICHARD; BARBARA C. PARHAM; WILLIAM E. SWINDELL, JR.; MILTON A. REID; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NORFOLK BRANCH; GEORGE BANKS; JULIAN HAZEL

Plaintiffs-Appellants,

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; MASON C. ANDREWS; JOSEPH A. LEAFE; JOSEPH N. GREEN, JR.; CLAUDE J. STAYLOR, JR.; ROBERT E. SUMMERS; ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM; MARTHA H. BOONE; PAUL M. LIPKIN, members of the City of Norfolk Electoral Board; VINCENT J. THOMAS, Mayor of the City of Norfolk

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (CA-83-526-N)

Argued: December 8, 1988 **Decided: August 18, 1989**

Before MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Frank Ruff Parker (William L. Robinson, Samuel Issacharoff, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; James F. Gay, on brief) for Appellants. Robert Harvey Chappell, Jr. (Paul W. Jacobs, II, CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL; Philip R. Trapani, Harold P. Juren, OFFICE OF THE CITY ATTORNEY, on brief) for Appellees.

BUTZNER, Senior Circuit Judge:

Seven black citizens of Norfolk, Virgina, and the Norfolk Branch of the National Association for the Advancement of Colored People appeal the district court's judgment denying their claim that the at-large system of voting for city council violates rights secured by the Voting Rights Act of 1965 as amended in 1982, 42 U.S.C. § 1973. The principal issue is whether the complainants have less opportunity than other members of the electorate to elect more than one councilman as the "representatives of their choice." § 1973(b).[1] The complainants assign error to the

---

[1] Section 2 of the Act, 42 U.S.C. § 1973, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be

district court's construction of the Act with respect to the meaning of the statutory term "representatives of their choice." They also contend that the district court erred by giving undue weight to the election of a second black councilman after this action was filed. In accordance with the Supreme Court's mandate, we have reviewed the district court's judgment in the light of Thornburg v. Gingles, 478 U.S. 30 (1986).[2] Finding merit in the assignments of error, we reverse the district court's judgment and remand the case for further proceedings.

I

In Collins v. City of Norfolk, 605 F. Supp. 377, 382-85 (E.D. Va. 1984) (Collins I), the district court recounted the history of the government of the city from the grant of its royal charter in 1736 to the present. During the intervening years, there were various methods of electing the city council. Much of the time the common council was elected by wards, and the select council was chosen by members of the common council. In 1918, the city adopted a new charter, which provided for a city council of five members elected at-large. Since 1952 the council has consisted of seven members elected at-large. Council members serve four-year, staggered terms, so every two years three or four of the seven seats are contested, except on oc-

---

considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[2] This action was commenced in 1983. The district court entered judgment for the city, Collins v. City of Norfolk, 605 F. Supp. 377 (E.D. Va. 1984) (Collins I), and this court affirmed, one judge dissenting, 768 F.2d 572 (4th Cir. 1985) (Collins II). The Supreme Court vacated this court's judgment, 478 U.S. 1016 (1986) (Collins III), and remanded for consideration in light of Thornburg v. Gingles, 478 U.S. 30 (1986). This court then reversed the district court's judgment and remanded for further proceedings, 816 F.2d 932 (4th Cir. 1987) (Collins IV). Upon remand, the district court entered judgment for the city. 679 F. Supp. 557 (E.D. Va. 1988) (Collins V).

casion when vacancies open more seats. All candidates compete for the open seats. The top three or four, as the case may be, are elected without any run-off. The elections are nonpartisan.

The district court also found that black voters in Norfolk were effectively disenfranchised by the Virginia Constitution of 1902. Among the devices used to limit black participation in elections were the literacy test, which remained in effect until the enactment of the Voting Rights Act of 1965, and the poll tax, which was declared unconstitutional in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). Prior to the passage of the Voting Rights Act, black voter registration was proportionately lower than that of whites. Now the facilities of the registrar's office are equally accessible to all citizens. The black voter registration rate and the turnout rate for council elections, based on the percentage of the black voting age population, are now greater than the registration and turnout rates of white voters. *See Collins I*, 605 F. Supp. at 384-85.

The 1980 census disclosed that Norfolk has a population of 266,979 persons of whom 60.8% (162,300) are white and 35.2% (93,987) are black. According to the census, the city's voting age population is 201,366 of whom 64.85% (130,595) are white and 31.48% (63,396) are black. *Collins I*, 605 F. Supp. at 382.

From 1918 until 1968, every member of Norfolk's city council was white. In 1968, Joseph A. Jordan, Jr., a black citizen, was elected to the council, and from that time until this action was filed the council had one black member. Jordan served until 1977 when he resigned, and Rev. Joseph Green, a black citizen, was appointed to fill the vacancy. Rev. Green was elected in 1978 and re-elected in 1982 and 1986. Although the city's population is 35% black and the rate of black participation in the electoral process is high, black citizens were unable to elect more than one black member (14%) to the seven-member council

until after this case commenced. Then in 1984, Rev. John Foster, a black citizen, was elected, under circumstances that will be discussed in part VI of this opinion. Since 1984, two black members (28%) have sat on the council simultaneously.

The district court construed the statutory term "representatives of their choice" to include successful candidates who received more than 50% of the black vote, even though unsuccessful candidates received a much higher percentage of the black vote. It also held that the election of Rev. Foster in 1984, after this action was commenced, and the subsequent re-election of incumbent black councilmen demonstrated that Norfolk's black citizens can elect representatives of their choice. These conclusions of the district court are critical in determining the validity of the district court's judgment. They are the subject of the complainants' primary assignments of error.

II

Section 2 of the Voting Rights Act of 1965 as amended in 1982 was enacted to prohibit the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color." The Act seeks to ensure that black citizens shall not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The Senate Report accompanying the 1982 amendments to the Act sets forth typical factors to be considered in determining whether the Act has been violated.[3] These factors are neither comprehensive nor ex-

---

[3] 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political

clusive, and complainants need not prove any particular number of them. *Gingles*, 478 U.S. at 45. Minority voters do not have to prove that the electoral system was created or is maintained for a discriminatory purpose. Congress intended that a violation could be proved by showing discriminatory effect alone. *Gingles*, 478 U.S. at 35, 43-44.

---

subdivision is racially polorized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 206-07 (footnotes omitted).

The district court found facts pertinent to the Senate Report. *See Collins V*, 679 F. Supp. 557, and *Collins I*, 605 F. Supp. 377. Except as noted in this opinion, the complainants do not question these findings.

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The Supreme Court has long recognized that at-large voting in a multimember political unit, such as Norfolk's city council, may prevent minorities from electing representatives of their choice by diluting their voting strength. *See Gingles*, 478 U.S. at 47-48. The potential for this type of discrimination may be enhanced by staggered terms. *Cf.* City of Rome v. United States, 446 U.S. 156, 185 (1980). But at-large voting for multimember offices does not *per se* violate minority voters' rights. Minority voters how assert that at-large voting in multimember political units violates the Act must prove that this electoral system "operates to minimize or cancel out their ability to elect their preferred candidates." *Gingles*, 478 U.S. at 48. More specifically, when at-large voting is alleged to be the diluting device that violates the Act, complainants must prove three facts: 1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) that the minority group is politically cohesive; and 3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51.

Racial bloc voting—or as it is sometimes called, racially polarized voting[4]—is one of the factors the Senate Report identified as probative in determining whether the act has been violated.[5] *Gingles* recognized it as a key element of a vote dilution claim. 478 U.S. at 55. Racially polarized voting is important for two reasons. First, it is a means

---

[4] *Gingles* uses these terms interchangeably throughout the opinion. *See* 478 U.S. at 52 n.18.

[5] *See supra* note 3.

of ascertaining whether minority groups constitute a politically cohesive unit. *Gingles*, 478 U.S. at 56.[6] The second purpose for inquiring about racially polarized voting is "to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 56. It is in this aspect of the district court's analysis of racially polarized voting that we detect error.

Ascertaining whether legally significant white bloc voting exists begins with the identification of the minority members' "preferred candidates" or "representatives of their choice."[7] Then the court must inquire whether in general a white bloc vote normally will defeat the combined strength of minority support plus white "crossover" vote for the minority's preferred candidates. *Gingles*, 478 U.S. at 56.

Whether an electoral system impairs the ability of black citizens to elect "representatives of their choice" is a question of fact subject to the clearly erroneous standard of review. *Gingles*, 478 U.S. at 78-79. But this standard " 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' " *Gingles*, 478 U.S. at 79 (citations omitted). We

---

[6] The district court found that Norfolk's black citizens vote sufficiently as a bloc to constitute a politically cohesive unit and neither side contests this finding. We need not discuss this aspect of polarized voting further.

[7] In the context of polarized voting, the Supreme Court differs over whether the race of the candidate is significant. *See Gingles*, 478 U.S. at 67-68 (irrelevant, plurality opinion); 478 U.S. at 82-83 (significant, White, J., concurring); 478 U.S. at 100-02 (significant, O'Conner, J., concurring); *see also Collins IV*, 816 F.2d at 936 n.3 (commenting on the different views). We need not pursue this issue to decide this case. Nevertheless, we will identify the race of the candidates by (W) for white and (B) for black.

cannot accept the district court's construction of the Voting Rights Act or its analysis of the facts based on its construction of the Act. These are errors of law or of mixed law and fact, which the clearly erroneous standard does not preclude us from correcting. *Gingles*, 478 U.S. at 79. The district court rejected the complainant's statistical analysis of election returns and accepted the city's. For the purpose of this opinion, we will refer only to the city's statistics.

III

We agree with the district court that the complainants have proved the first two elements of their cause of action. The court found that Norfolk's black population is sufficiently large and geographically compact to constitute a majority in two districts. The complainants contend that they would constitute a majority in three. In any event, the first element is satisfied. The district court also found that Norfolk's black citizens are politically cohesive. This satisfies the second element. It is the third element that the district court found lacking. The district court held that "Norfolk's whites do not vote sufficiently as a bloc that they usually defeat the minority's preferred candidate." *Collins V*, 679 F. Supp. at 566.

IV

The proper identification of minority voters' "representatives of their choice" is critical. The Act was intended to assure that minorities do not have less opportunity than other members of the electorate "to elect representatives of their choice." 42 U.S.C. § 1973(b). In *Collins IV*, we cautioned that great care must be exercised in identifying the minority's preferred candidates or representatives, saying:

> The mere election of a candidate who appears to have received votes from more than fifty percent

> of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice. Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of that minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

Collins IV, 816 F.2d at 937 (footnote omitted).

The district court treated successful candidates who received more than 50% of the minority vote as the minority's representatives of choice even though candidates who received a much higher percentage of the minority vote were defeated. *Collins V*, 679 F. Supp. at 568. In 1974, Lenious G. Bond (B) received 73.4% of the black vote; he was defeated. Elizabeth M. Howell (W) received 58.2% of the black vote; she was elected. Claude J. Staylor, Jr., (W) received 56.5% of the black vote; he was elected. The district court held that Howell and Staylor, rather than Bond, were the minority's representatives of choice. A similar situation arose in the 1980 election. Evelyn T. Butts (B) received 92.9% of the black vote; she was defeated. Howell (W) received 72.9% of the black vote; she was elected. The district court held that Howell, rather than Butts, was the minority's representative of choice. *Collins V*, 679 F. Supp. at 574-75.

According to the principles we explained in *Collins IV*, 816 F.2d at 937, Howell and Staylor are presumed not to be the minority's preferred candidates or representatives of choice. This presumption imposed on the city the burden of going

forward with evidence to rebut or meet the presumption. Fed. R. Evid. 301. The city relied chiefly on testimony that Howell and Staylor were endorsed by a black political organization, Concerned Citizens of Norfolk, and had black support greater than some of the lesser black candidates. The district court held that the presumption that Howell and Staylor were not the minority's representatives of choice was "overwhelmingly rebutted." *See Collins V*, 679 F. Supp. at 574-75.

The proof offered by the city is insufficient to overcome the presumption that Howell and Staylor were not the black community's representatives of choice. The Concerned Citizens' endorsement is not dispositive because it endorsed several candidates, black and white. Moreover, the difference between the level of black support for Howell and Staylor and the level of black support for black candidates who received less than 50% of the black vote is immaterial. Those black candidates who received few votes were not the black community's preferred candidates. As we clearly explained in *Collins IV*, 816 F.2d at 937, the critical fact is the difference between the black support for the candidate who received the most black votes yet lost and for the candidates who won with fewer black votes.

Gingles, quoting the Senate Report, emphasizes that " 'whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality" ' and on a 'functional' view of the political process." 478 U.S. at 45. Therefore, in addition to the bare statistics, it is appropriate to consider testimony revealing how political observers and the candidates themselves viewed the city's claim that Howell and Staylor were the minority's preferred candidates and representatives of choice. When questioned by the city's attorney, Rev. Green, a black member of the council who served with Howell and is a defendant in this action, testified:

> Q. Is Mrs. Howell looked upon in the black community as a representative of that community?
>
> A. Not as a representative of that community, but as a supporter of that community.

Exhibit Vol. I at 1616. William E. Swindell, Jr., a black deputy sheriff who is one of the complainants, also testified at trial that Howell is "not a representative of our community." App. Vol. I at 161. He explained: "Even though she receives black votes, she doesn't live in our community. She doesn't share our experiences." App. Vol. I at 160.

Howell's testimony also reveals that she cannot be considered to be the black community's representative of choice. While being thoroughly questioned on her sources of political support, Howell admitted that she had received high levels of black support in the past, but she did not characterize herself as a representative of the black community. Exhibit Vol. II at 1831. She testified: "There are problems in the black community right now which I don't care to be involved in, so I'm not." Exhibit Vol. II at 1855. Howell stated that she had no opinion on the issue of school busing. Exhibit Vol. II at 1854. She did not think that the black community of Norfolk had any special needs or interests. Exhibit Vol. II at 1904. She was unaware that black people in Norfolk had higher rates of poverty and unemployment and lower levels of education than whites. Exhibit Vol. II at 1899-1900.[8]

Staylor also did not consider himself to be the black community's candidate of choice. In 1974, Staylor was first elected to city council with black support after he resigned from a police officer's organization because it refused to admit black people. Exhibit Vol. I at 1604-05. He testified

---

[8] The district court found that black persons in Norfolk generally do not fare as well as white persons with respect to income, education, housing, and employment. *Collins I*, 605 F. Supp. at 391.

that he voted against a proposal to build a memorial to Martin Luther King because he believed King was responsible for inciting riots, associated with communists, and was not a "patriotic, good American." Exhibit Vol. I at 1646-47. Staylor has also been an outspoken opponent of school busing. Exhibit Vol. I at 1659-63. In 1978, Staylor lost virtually all black support because of his position on issues of importance to black voters. Nevertheless, he was re-elected by white voters.

The district court's error in finding successful candidates who received over 50% of the minority vote to be the chosen representatives of the minority community, despite the fact that other candidates received a much greater percentage of the minority vote, is not simply technical or semantic. It is an error of mixed law and fact that defeats the Voting Rights Act's purpose of securing equal opportunity for minorities to "elect the representatives of their choice." By declaring that Howell in two elections and Staylor in one election were the chosen representatives of the black community, the district court was able to find that there was no significant white bloc voting. On this basis the district court held that the complainants had not satisfied the third requirement of *Gingles*, 478 U.S. at 51, for showing a violation of the Act.

A moment's reflection shows how the district court's method of identifying the black community's representatives of choice defeats a primary purpose of the Act. In 1974, 21 candidates sought the 4 open seats on the council. In 1980, 12 candidates vied for 3 open seats. In 1974, each voter—black and white—could cast four votes and in 1980 three votes. If black voters exercised their right to cast all of their allotted votes, they ran the risk that their second and third choices would be declared their preferred candidates. Only by single-shot voting—withholding all votes save for their first choice, and forfeiting the opportunity to cast all votes allotted to each voter—could the minority be assured that its second and third choices would

not be declared its preferred candidates. In contrast, under the at-large system, the white voters can freely cast all votes allotted to them without suffering the penalty imposed on the minority voters. The district court's construction of the Act defeats the congressional purpose of assuring that the opportunity to participate in the electoral process is equally open to all citizens.

We are aware of no case that supports the district court's construction of the Act. Two cases have rejected it. In Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 502 (5th Cir. 1987), the court said:

> In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate. In the Gretna elections studied, blacks exercised their right to vote to fill all at-large positions, but only one available candidate was black. Thus, it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference.

In Campos v. City of Baytown, 840 F.2d 1240, 1245 (5th Cir. 1988), the court rejected the argument that "any time a candidate gets a majority of the minority votes he is the 'chosen representative' of the minority group." We are aware that the factual situations in these cases differs from that in Norfolk, but their underlying premise is applicable: support for some successful candidates by a majority of minority voters in multimember district races does not prove that the successful candidates were the chosen representatives of the minority when a candidate who received much greater minority support was defeated.

"Definitions and legal criteria . . . must accord with law, and will be reviewed as legal questions." *Collins IV*, 816 F.2d at 938. The district court erred in construing the statutory term "representative of their choice." This skewed its analysis on which it relied to decide the case.

V

If the degree of minority electoral success necessary to defeat this voting rights action were the ability to elect a single candidate to the council, this action would border on the frivolous. Since the passage of the Voting Rights Act of 1965 and the elimination of the poll tax, the black community of Norfolk has been able to elect a single councilman. But this case involves the community's inability to elect a second member until after the institution of this action.

The city attaches great significance to the fact that black candidates have won in seven of ten elections from 1968 to 1986. It emphasizes that since 1968, of the 13 black candidates supported by 70% of black voters, 7 (54%) have been elected.

The significance of these statistics is superficial, because they are largely based on the black community's ability to elect a single black member of the council. The statistics ignore the fact that from 1968 until after this action was brought, the black community was unable to elect a second representative to the city council. To use the city's analysis of the statistics to defeat this action simply places a stamp of approval on token representation.

Gingles explains that "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." 478 U.S. at 56. In the context of this case it is necessary to apply *Gingles'* teaching to the black community's attempt to elect a second black councilman.

It is apparent from the record that the white majority normally voted sufficiently as a bloc to defeat the combined strength of strong minority support plus white crossover votes for minority preferred candidates who sought a second seat on the council. In 1970, Roland J. Walton (B), who received 92.4% of the black vote, received only 14% of the white vote. In 1974, Bond (B), who got 73.4% of the black vote, received only 7.6% of the white vote. In 1980, Butts (B), who received 92.9% of the black vote, received only 9.5% of the white vote. In 1982, Butts (B), who received 87.6% of the black vote, received only 11.2% of the white vote.

Although black voters usually tried to elect a second black councilman, this was not always the case. In 1976, for example, no black candidate opposed Jordan (B), an incumbent. He was re-elected with 97.3% of the black vote and 24.3% of the white vote. The candidate whom the black voters preferred for a second representative on the council was R. Braxton Hill, Jr., (W), who received 76.3% of the black vote and only 20.0% of the white vote. His defeat demonstrates that—regardless of the race of the candidate—the black community, prior to the institution of this suit, could not elect a second representative of their choice.

The statistics show that from 1968 until 1984 all of the minority-preferred candidates for a second seat on the council were defeated by candidates preferred by white voters. This is precisely the situation *Gingles* described as demonstrating "legally significant white bloc voting." 478 U.S. at 56. The statistics also demonstrate that the complainants have satisfied the third requirement for proving a cause of action under the Voting Rights Act when the inhibiting electoral device is at-large voting. They show that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

VI

The city maintains that members of the black community have no cause for complaint because in addition to its success in electing a single black member to the council from 1968 to 1984, in 1984 a second black member was elected.

Gingles, however, cautions against finding a lack of racially polarized voting where the success of a minority candidate can be attributed to special circumstances. The Court said:

> [T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.

478 U.S. at 57. The Court noted that this list of special circumstances is not exclusive. 478 U.S. at 57 n.26.

The complainants assert that the election of a second black councilman, Rev. Foster, in 1984 was caused by special circumstances and so his election does not negate the existence of racially polarized voting. The city maintains that the district court's finding that Rev. Foster's election was not the result of special circumstances is not clearly erroneous.

In Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) *aff'd sub nom* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), the court said:

> [W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. . . . [S]uch success might be attributable to political support motivated by different consid-

> erations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds.

485 F.2d at 1307.

Zimmer's example illustrates precisely what happened in Norfolk before the election of the second black councilman in 1984 after this action had been filed. For the first time the mayor supported a second black candidate. Moreover, during the pendency of this action, in which the mayor was a defendant, he publicly stated: "After the election, the issue of black representation may become a moot point." Exhibit Vol. I at 1472. In the same election the "west side group" with which the mayor was affiliated endorsed only two candidates when three seats were vacant. One of the city's witnesses, a member of the House of Delegates of the Virginia General Assembly, described this situation as "unique" or "surprising to say the least." App. Vol. II at 845.

When this case was previously before us after remand from the Supreme Court, we directed the district court to ascertain whether the mayor's remark elicited unusual white support for the black candidate. We added that the district court's findings would not be disturbed unless they were clearly erroneous. *See Collins IV*, 816 F.2d at 938. The district court held that there was no unusual white voting pattern in 1984. *See Collins V*, 679 F. Supp. at 577-78.

Review of the record convinces us that the district court's finding is clearly erroneous. *See* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Fed. R. Civ. P. 52(a). The flaw in the district court's finding is readily apparent. It compared elections in which only one representative of the black community was elected with the 1984 election in which a second black councilman was elected. In support of its finding, the district court emphasized that Rev. Foster, the successful black candi-

date for a second black seat on the council, received 26.6% of the white vote in the 1984 election. The court then compared this vote with the results in previous elections—in 1982, 1978, and 1968—in which black candidates received 31.1%, 32.2%, and 28.7% of the white vote to fill a single minority seat on the council. *Gingles*, 679 F. Supp. at 577-78.

The statistics show that until the 1984 election, when the mayor supported a black candidate and suggested that this suit could be mooted, white voters had cast ballots in sufficient numbers to defeat a second black councilman. Never before had white support for a candidate seeking to become the second black member of the council remotely approached 26.6%. Prior to 1984, the greatest white support for a black candidate seeking a second seat on the council occurred in 1970. In that year, Walton (B) received 92.4% of the black vote and 14.0% of the white vote. He was defeated. Rev. Foster's unprecedented receipt of 26.6% of the white vote was 90% higher than the previous high white vote ever cast for a black candidate who sought a second seat on the council.

Unusual white support for Butts (B) also demonstrates that the 1984 election of Rev. Foster was due to the special circumstances arising out of events associated with the pendency of this action. In 1982, Butts received 11.2% of the white vote and in 1980 only 9.5%. Yet in 1984 after the mayor suggested how this action could be mooted and the "west side group" fielded only two candidates, she received 24.2% of the white vote. Her white vote in 1984 increased 116% over her white vote in 1982 and 155% over her white vote in 1980.

The statistics disclose that no black candidate seeking a second seat on the council as the chosen representative of the black community received more than slight white support until the unprecedented circumstances that occurred in 1984 after this action was filed. The figures also

demonstrate that, prior the the special circumstances of 1984, white voters were able to defeat the combined strength of black voters and white crossover votes, denying the black community a second seat on the council.

We therefore conclude that the election of a second black councilman in 1984 was the result of special circumstances and should not be dispositive in determining whether Norfolk's at-large voting for a multimember council dilutes black voting power. *See Gingles*, 478 U.S. at 57, 75-76.

VII

The complainants also assign error to the district court's finding that the council's appointment of Rev. Green in 1977 to fill the vacancy resulting form Jordan's resignation was not a special circumstance. *Collins V*, 679 F. Supp. at 579-80. The city asserts that there is little doubt that had a black not been appointed the complainants would have called foul and used this as evidence of white council members' insensitivity.

If, as it appears from the city's brief, Rev. Green was appointed to forestall black criticism, this would indeed be a special circumstance. *Cf. Zimmer*, 485 F.2d at 1307. In any event, Rev. Green's appointment has little bearing on the black community's ability to elect a second representative to council, except in a subsequent election after this action was filed when he was able to run with the advantage of incumbency.

Gingles mentions incumbency as a special circumstance that may explain minority success. 486 U.S. at 57. In this case, incumbency was a significant factor in black electoral success. No black incumbent was ever defeated. Conversely, with two exceptions, in the eleven elections from 1968 to 1988, inclusive, no black candidate who was not an incumbent was elected. The first exception was in 1968 when Jordan became the first black member of council

since the at-large system was instituted in 1918. The second exception was in 1984 when Rev. Foster was elected after this action was filed and the mayor stated that the election might moot the suit. The re-election of incumbents in 1986 and 1988, coupled with the pendency of this action and the manifest desire to moot it as evidenced by the 1984 election, also demonstrates that recent re-election of black candidates is attributable to special circumstances. These elections do not negate the existence of the white bloc voting that has characterized the at-large elections in Norfolk.

VIII

The complainants also allege that the district court erred in holding that there was no racial discrimination in the slating process in the 1976 and 1980 elections. *Collins V*, 679 F. Supp. at 581-83.

Slating and denial of black access to the slate are mentioned as pertinent factors in the Senate Report, *see supra* note 3. Nevertheless, in the context of this case, whether slating existed in 1976 or 1980 is largely immaterial. Analysis of the election returns show that from 1968 until 1984 no black candidate could get elected to a second seat on the seven-member council and the single black representative was never defeated. The same pattern prevailed in the two years in which slating was charged and in the years in which it was not. White bloc voting, not slating, was the cause of the black community's inability to elect a second councilman in 1976 and 1980.

IX

In sum, the complainants have satisfied the tripartite test set forth in *Gingles*, 478 U.S. at 50-51, for proving a violation of the Voting Rights Act. They have shown 1) that the minority group is sufficiently large and geographically compact to constitute a majority in at least

two single-member districts, 2) that the minority group is politically cohesive, and 3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate for a second seat on the council.

To be sure, after the passage of the Voting Rights Act of 1965, since 1968 the black citizens of Norfolk have attained at least token representation on the city council. But in the absence of special circumstances, they have not been able to elect a second representative of their choice. Even the candidates elected as a result of special circumstances in 1984, 1986, and 1988 do not give representation in proportion to the black population. But the complainants do not seek proportional representation, and the Act does not require it. The Act does, however, protect them from a system of at-large voting that, tested by the principles explained in *Gingles*, 478 U.S. 30, gives them "less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The judgment of the district court is reversed. The case is remanded for further proceedings consistent with this opinion. Upon remand the district court should enjoin at-large elections for city council. The district court should afford the city a reasonable, specified time to prepare a plan that will remedy the vote dilution arising out of the city's at-large electoral system. The city must then submit the plan for clearance under section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973c. If the city fails to enact a legal plan, the court should prepare a single district plan for the conduct of future elections. *See generally* Wise v. Lipscomb, 437 U.S. 535 (1978); Cosner v. Dalton, 522 F. Supp. 350, 363-64 (E.D. Va. 1981) (three-judge court).

CHAPMAN, dissenting:

Because I believe the majority has created new rules which too narrowly restrict who may be a "minority-pre-

ferred candidate" also called "representative of their choice," and which define "legally significant white bloc voting" in a manner contrary to the emphatic language of the statute, I dissent.

I

As the majority has noted, in this challenge to an at-large voting system under 42 U.S.C. § 1973, complainants must prove (1) that their minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) that their minority group is politically cohesive, and (3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986). As the majority opinion also recognizes, resolution of this case depends on whether plaintiffs have satisfactorily proven the third prong of this test, legally significant white bloc voting. It is apparent that within the third element are two determinations to be made: first, who can be counted as a "minority-preferred candidate," and, second, the legal meaning of "usually to defeat" such candidates. The first question is addressed in this section; the second will be considered in Section II.

Unfortunately, neither *Gingles* nor the statute resolves the precise question of who can be counted as a "preferred candidate." The most specific formulation of a test on this point has been offered by this court, in *Collins IV*, 816 F.2d 932, 937 (4th Cir. 1987), in which we stated that the support of a successful candidate by a majority of black voters does not necessarily make the candidate "preferred." In fact, a presumption against such a candidate's representativeness is invoked if some losing candidate received significantly more minority votes. *Collins IV*, 816 F.2d at 937. In this case the question is whether two white candidates, Elizabeth Howell, elected to the council in 1974 and 1980, and Claude Staylor, elected to the council in

1974, can be regarded as "preferred candidates" of the minority. As the majority indicates, in 1974, three candidates received over 50 percent of the black vote. They were: Lenious Bond (black, 73.4 percent), Elizabeth Howell[1] (white, 58.2 percent), and Claude Staylor, (white, 56.5 percent). Howell and Staylor were elected, and Bond was defeated. In 1980, of the two candidates who received more than 50 percent of the black vote, Evelyn Butts, black, received 92.9 percent and lost, while Howell received 72.9 percent and won. The majority concludes, reasoning from *Collins IV*, *Gingles* and two Fifth Circuit decisions, that the district court's finding that Howell and Staylor were preferred candidates of the minority is an "error of mixed fact and law."

Although, as the majority recognizes, the legal and factual issues presented are intertwined, the majority result is nonetheless incorrect because it wrongly construes, both legally and factually, the operation of the *Collins IV* presumption against representativeness. First, implicit in the majority discussion is a legal assumption that in each election there can be only one black-preferred candidate. *Collins IV*, however, is to the contrary. We specifically referred to the fact that "each such [voting] situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community." *Collins IV*, 816 F.2d at 937. The effect of this language is not to require a finding of "most preferred," but this is what the majority proposes. The test is whether the elected candidate can be *fairly* considered as a representative of the minority community and not whether such candidate is the "most preferred." Moreover, it is worth noting that neither appellants nor the majority seem to object to counting Howell as a black- preferred candidate in 1978, when she received roughly the same support of the black community as she did

---

[1] Mrs. Howell ran ahead of three black candidates in the black community and she received a higher percent of the black votes than white votes.

in 1974 and 1980. The only difference among the elections is that the black candidate, who received the greatest support of the black community in 1978, was elected. In short, *Collins IV* only creates a presumption, not a rule, that only the most black-preferred candidate can be counted as preferred.

Further, there is no case law to support the idea that preferred means "most preferred." In fact, the two Fifth Circuit cases cited by the majority stand, in part, for an opposite principle. In *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), the court stated that "In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate." The pertinent issue in *Gretna* was whether a black candidate should be counted as a preferred candidate when he was the only black running for the council, despite the fact that he received a lower percentage of black votes than two white candidates. The court found that he could be the minority preferred candidate because it was an election for more than one seat and he was the only black candidate. In *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), the Fifth Circuit held that there may not be a black-preferred candidate when only white candidates sought black or Hispanic votes. *Campos* carries little weight because in the 1974 and 1980 Norfolk elections, blacks sought election to six of the seven available council seats.

The majority's citation of *Campos* and *Gretna* suggests, albeit implicitly, an additional reason why the majority has construed the legal effect of the *Collins IV* presumption so decisively against the city. In both *Gretna* and *Campos* the Fifth Circuit adopted a rule that the candidate's race may be taken into account in determining whether he or she is black-preferred. As the court explained in *Gretna*, "We consider [the black candidate] to be an aldermanic candidate sponsored by the minority group because he received a significant portion of the black vote, and because he is black." *Gretna*, 834 F.2d at 503. Despite the ma-

jority's assertion that it does not decide the issue of whether the race of the candidate is relevant, the harsh way in which the presumption is invoked against Staylor and Howell makes it difficult to conclude that their exclusion as black-preferred candidates is not related to their race. Just as with the majority's assumption that there can be only one black-preferred candidate, the problem with considering the race of the candidate is that it appears to contradict the law of this circuit. This court, at least implicitly, rejected considering the race of the candidate in *Collins IV*, 816 F.2d at 937 n.5, when it stated that: "The question is not, however, so simple as how many blacks versus whites were elected. The [district] court must examine the parties' studies of voting preferences to determine which were the preferred candidates of the majority and minority communities."

The effect of the majority's modification of the *Collins IV* presumption is plainly revealed in the majority's discussion of the facts that are said to require the presumption to go unrebutted. The majority first cites the rather conclusory statements of plaintiffs' witnesses to the effect that they believed Staylor and Howell were not "representatives" of the black community. Considering the fact that "representatives" is a legal term, such statements should have little weight, particularly when compared with aggregate voting data indicating majority support for such a candidate.

The remainder of the majority's evidence redefines the very meaning of electoral representativeness. It finds that Howell and Staylor are not representative because Howell said she does not have an opinion on school busing, that she believed that the black community might not have special interests, and because Staylor remarked that he does not admire Dr. Martin Luther King, Jr. The disturbing aspect of this kind of evidence is that it has nothing to do with vote dilution. It only suggests the *ideas* of certain candidates, and has nothing to do with whether

black *voters* were denied equal access to the election process. Representativeness in a Voting Rights context concerns access, and it does not create a right to the representation of certain ideologies. It is discomforting that the majority seems to be suggesting what minority voters should believe. A consequence of such a rule would be a litmus test for the political beliefs of minority preferred candidates. The entire discussion assumes that in Norfolk there are "proper" black political attitudes, and therefore under the Voting Rights Act some ideas are worth more than others. Ironically, the majority's position actually debases the votes of those blacks who do not ascribe to the views imputed to their race by the majority. In this context it is worth noting that Evelyn Butts, by the plaintiffs' own contention, a black-preferred candidate in both 1982 and 1984, testified that she supported continuation of an at-large voting system in Norfolk. According to the majority's reasoning, it follows that this black woman, who won 87 percent and 72 percent of the votes of the black community in two elections, might not be a black preferred representative.

While focusing on evidence that would redefine vote dilution representativeness in terms of intellectual persuasion, the majority ignores substantial evidence that both Howell and Staylor were in fact the legitimate representatives of the black community. The fact of Ms. Howell's consistent and substantial black support are overwhelming and uncontradicted. In 1974 and 1980 she was endorsed by the Concerned Citizens of Norfolk (CCN), the city's most powerful black political group. In 1974, she got more votes than three black candidates. In 1980 she ran better in the black community than one of the two black candidates. She received twice as many black votes as the black president of the Norfolk NAACP. In both elections she received twice as much black support as white support, and she was never supported by more than 39 percent of the whites. The majority's ruling, as a result, puts her in

the absurd position of being overwhelmingly elected three times, but neither black-preferred nor white-preferred. Staylor's black support, in the 1974 election, is also thoroughly documented. Staylor, the City's Chief of Police, resigned from a police officer's organization because it refused to admit blacks. He was endorsed by the CCN.[2] In 1974, he defeated three black candidates and seven other white candidates among black voters. He received only about 10 percent more support among white voters than among black voters.

The endorsement by the CCN of these candidates is worth emphasizing. The district court noted that the CCN is the most influential black political group in Norfolk. In 1974, the CCN endorsed Bond, Howell, and Staylor. Three other black candidates were not endorsed by the group. Bond, Howell, and Staylor subsequently received the highest totals of black vote. In 1980, the CCN endorsed Howell and Butts, but did not endorse Banks, the president of the NAACP. Again, the CCN candidates, black and white, outperformed a competing black candidate among black voters. Finally, the majority concludes that an additional reason Staylor and Howell should not be counted as black-preferred is because their vote somehow reflects a forced casting of all ballots, implying that some whites had to get a large number of black votes. This is not supported by the evidence even though these were multiseat elections. In 1974, Norfolk blacks could have cast all four of their ballots for black candidates, but they chose not to. In 1980, Norfolk blacks could have used the first two of their three ballots to support blacks, but again they chose not to. Similarly, the CCN could have endorsed blacks for six of the seven open seats in 1974 and 1980, but it only endorsed two blacks.

---

[2] Plaintiff Collins testified that Staylor was one of three candidates of choice among the blacks in 1974.

In sum, the exclusion of Staylor and Howell as black-preferred candidates is unwarranted either under the law or under the evidence.[3] The majority's interpretation of the rebuttable presumption of *Collins IV* assumes that preferred candidate means most preferred and implicitly adopts a rule which considers black candidates more likely to be black-preferred than white candidates. Further, the court, in imposing the presumption, uses an ideological test in order to determine representativeness. This actually dilutes the votes of black citizens, who disagree with the court's version of black politics, while enhancing the position of a political, not racial group. By emphasizing the ideological test the court has improperly neglected election evidence that Howell and Staylor consistently ran ahead of black candidates among black voters and won the support of the CCN. All of this calls into question the majority's view of the law and the facts. I feel the district court properly considered the law and I believe its factual findings under this law were not clearly erroneous. I would consider Staylor and Howell as preferred representatives of the black community.

II

Having decided what candidates can be counted as black-preferred, the question becomes whether the white majority votes sufficiently as a bloc to enable it "usually to defeat such candidates." If Howell and Staylor are considered black-preferred candidates, then the black-community, since 1968, has elected 11 of its 19 preferred candidates. This means that during the same period the black community was represented by one of seven council

---

[3] Reverend Green testifying about Staylor's resignation from the all white police officers organization stated: "The black community thought it was a brave statement, and when he ran for council, they voted for him overwhelmingly. He received the largest vote any candidate has ever received for City Council in the history of the election of the members of City Council."

members (14.3 percent) between 1968 and 1974, two of seven council members (28.6 percent) between 1974 and 1984, and three of seven members (42.9 percent) since 1984. Because black-preferred candidates have won 11 of 19 elections and this is "usual success," not usual defeat, and because in Norfolk, a city 30 to 35 percent black, these numbers indicate that blacks have been sufficiently and proportionately represented, I believe the district court was correct in determining that plaintiffs had failed to satisfactorily prove the third prong of the *Gingles* test, the test of legally significant white bloc voting.

Even without the inclusion of Howell and Staylor as black representatives, plaintiffs have failed to show legally significant white bloc voting. It is that part of the majority opinion which addresses this issue that is the most objectionable. It concludes that the test of usual defeat is not a general test, but depends, instead, on blacks' success in achieving a second seat on the Norfolk council. The special quality of a second seat, although never directly explained by the majority, is that it is the seat which would give plaintiffs proportional representation. The majority concludes that this case is not about electing a single candidate to the council, but is about the black community's success in choosing a *second*, that is, proportional representative. The majority does not cite any authority for the proposition that the correct legal test for bloc voting is whether the majority votes sufficiently as a bloc to usually defeat candidates *for a proportional seat*. There is no such authority. The majority has fashioned a new and sweeping rule of proportionality.

Gingles, unfortunately, does not address the question squarely, but states that a court must determine whether the white majority votes sufficiently as a bloc to usually defeat black-preferred candidates. The rule is expressed only as a general test, effecting a flexible measurement of vote dilution in contests of at-large systems. Moreover, the *Gingles* court indicated that there is no violation when

proportionality is achieved. Therefore one might surmise that under *Gingles* proportionality and "usual success" are not the same, but represent the upper and lower boundaries of a Section 2 analysis.

The majority's rule can be distinguished from that stated in *Gingles* because it is not general or flexible. More important, it is incorrect because it directly contradicts the stated intent of Congress in amending § 2. The principal purpose of the 1982 amendment was to eliminate proof of discriminatory purpose as a prerequisite to establishing a § 2 violation. From the beginning, it was recognized that the elimination of the intent requirement would not confer a right of proportional representation on a minority group. 1982 U.S. Code and Cong. Ad. News 179. When enacted, the statute explicitly stated that "the extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered," and provided that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

Although the results test implies that it is necessary, in part, to measure potential violations by candidate success, the denial of a right to proportional representation is also a fundamental, and not an incidental part of the statute. The importance of this limitation was repeated often in the House and Senate discussions on the bill. The Senate Judiciary Committee, which was largely responsible for the form of § 1973(b), made it clear that a denial of equal access was not coequal with the nonexistent right of proportionality. 1982 U.S. Code Cong. and Ad. News 311-320, 363-364, 369. Moreover, not a single senator who voted for the bill argued that a § 2 violation could be shown by a lack of proportional representation. Senator Mitchell stated that the no right to proportionality provision "should dispel any fear about whether this bill will result in proportional representation." Senator Tsongas noted that the

provision should allay any fear that the " 'results test' will have the effect of mandating a system of proportional representation." Senator Dole, one of the principal authors of the bill, indicated that "No minority group has any constitutional or statutory right to have elected any particular number of their group to political office." He added that "Equal access is not to be confused with any assurance that minorities must be elected in proportion to the their population." Senator Kennedy, another major sponsor of the bill, referred to "highly offensive concepts of proportional representation." Senator Warner stated that the provision was "assurance that the proposed changes in § 2 of the Act would not result in court-ordered establishment of systems of proportional representation by race." 128 *Cong. Rec.* 14, 313 (Mitchell); 14,306 (Tsongas); 14, 316-17, 14, 337 (Dole); 14, 133 (Kennedy); 14,334 (Warner). All of these statements are the remarks of persons who supported the bill, and they are conclusive evidence that Congress did not intend that a right of proportional representation be established by a court created test.

Although the majority states that its holding is in harmony with Congress' explicit rejection of proportionality, the nature of the legal test used establishes a right of proportionality. The majority considers the election of one black to the council, even consistently, over a 20 year period, as tokenism. It states that a case to insure the election of one such black "would border on the frivolous." It focuses, instead, on the "black community's inability to elect a second representative." *Gingles* is interpreted to require scrutiny of white bloc voting "for minority preferred candidates who sought a second seat on the council." The most pertinent fact, according to the majority, is that between 1968 and 1984 "all of the [black] minority-preferred candidates for a second seat on the council were defeated by candidates preferred by white voters." These statements indicate that by analyzing the case in such a manner the majority has fashioned a right of proportion-

ality. There is no other way to construe this language than to conclude that the failure to achieve proportionality and the § 2 violation are one and the same. As such, the decision does not merely creep up to the notion of proportionality, it embraces it.

The effect of such a rule extends far beyond this case. The majority decision guarantees proportionality in every jurisdiction in this circuit, because it concludes that the usual failure of a minority candidate who is running for a proportional seat is illegal vote dilution. Any at-large system, which does not usually produce proportional representation, is now illegal. Such a holding ignores the clear intent of Congress, and fails to offer any meaningful judicial compromise of the tension created by the coexistence in § 2 of the results test and the no right to proportionality provision. Here, all doubt is resolved in favor of proportionality.

A proper test, which takes into account the meaning of the entire statute, would inquire as to whether black-preferred candidates are normally, or usually defeated. Such a rule does not measure a violation by a right of proportionality, which does not exist. By taking into account the historic success or failure of all black candidates, it would also provide a more accurate portrayal of vote dilution. It would recognize that the election of a single black is not unimportant, because in an at-large system the majority always has the strength to elect all of its candidates. Such a rule would also take account of those situations, as in Norfolk, where, because of its size, the black community is likely to seek more than one seat. It would consider that when there are more defeats of black-preferred candidates, the evidence is more compelling that the system is operating to dilute black votes. *See Gingles*, 478 U.S. at 56 (listing the kinds of factors that should be considered in a white bloc voting analysis). The effect of such a rule would be to give real meaning to all of the statutory language and to Congressional intent by accommodating

both the results test and the denial of a right of proportionality.

Under such a test, between 1968 and 1986, 7 of the 13 black-supported candidates were elected to office. Therefore blacks have not normally or usually been defeated. If Howell and Staylor are considered as black-preferred candidates, then such candidates have won 11 of 19 elections during the same period. These successes are enough to defeat plaintiff's claim of "legally significant white bloc voting."

III

Although the most far reaching aspects of the majority's opinion are discussed in Sections I and II, the majority's treatment of several factors as "special circumstances" to explain black success, deserve comment because they indicate a more general problem of the manner in which the majority's treatment of factual issues in this case tends to limit the deference due the district court findings.

The majority discounts the success of Reverend Foster in 1984 by ascribing it to the white Norfolk Mayor's endorsement of Foster, and indicates that the Mayor was motivated by an attempt to moot this lawsuit. As this court held in *Collins IV*, 816 F. 2d at 938, however, "the Mayor's intent, or whether he or other leaders conspired, is not dispositive" of the legal issue of whether the election was a "special circumstance." Instead, "A proper inquiry must examine the result of the Mayor's conduct and statement. If voting patterns show unusual white support for the black candidate in 1984, the legal significance of his success should be diminished." A finding of unusual white support should be disturbed only if clearly erroneous. *Collins IV*, 816 F.2d at 938. The majority holds that the district court committed legal error because it measured the white support for Foster in 1984 against white support

for all other black candidates, and not just against black candidates contending for the "second seat."

First, this analysis is incorrect on the ground, already stated, that it establishes a right to proportional representation. Foster's success should be compared against the white vote for all blacks, not just those running for the proportional seat. This evidence indicates that Foster's level of white support was not unusual at all. Green (1978, 1982, 1986) and Jordan (1968) are blacks who received greater white support than Foster. Moreover, Foster's success was statistically insignificant when compared to the performance of black-preferred candidates in four other elections. Foster's white support was either less than or equal to white support for other black candidates in eight of thirteen elections. The district court's finding that there was no "special circumstance" in Foster's election is not clearly erroneous.

More seriously, the majority's conclusion is incorrect even on its own terms. In the same 1984 election, Evelyn Butts, a black seeking election to the same "second seat," received 24.2 percent of the black vote. This total is statistically insignificant from Foster's 26.6 percent figure. The majority's effort to explain this by stating that unusual support for Butts was also evidence of unusual white support for Foster, the elected candidate, is unfathomable. First, the Mayor and his supporters' acted for Foster, not Butts. Their action in behalf of Foster is the sole basis for this special circumstance inquiry. Thus, the question is whether the mayor's support produced unusual support for Foster, not Butts. The implication of Butts' relative success among white voters is plainly that the Mayor's actions *failed* to produce unusual support for Foster because Butts performed just as well among whites as Foster. White votes for Butts did not help Foster to get elected, so this did not produce a so-called "special circumstance." Under any test, the district court was not clearly erroneous in finding Foster's election was not the

result of "special circumstance." Indeed, the nature of the dispute over what the evidence reveals emphasizes why fact finding is entrusted to the trial judge.

Second, the majority holds that the district court's finding that incumbency was not a special circumstance was clearly erroneous. The majority's test seems to be that the electoral success of incumbents and the defeat of nonincumbents indicates that incumbency rises to the level of a special circumstance. Such a rule would make practically every American election a "special circumstance." For "special circumstance" to have any meaning one must produce specific evidence that incumbency, in the case of individual candidates, produced real benefits. The evidence here is that it did not. The majority points out that "with two exceptions" "no black candidate who was not an incumbent was elected." The problem with this conclusion is that between 1968 and 1988 there were only six black-preferred candidates, who ran as unelected non-incumbents, and two of them were elected. The majority seems to reason if perhaps four, five, or all six non-incumbents were elected, then incumbency could not be considered a special circumstance. Given the nature of the election process, the expectation is unreasonable, particularly because the pertinent question is whether non-incumbency itself is an unusual handicap in Norfolk. The majority also states that no incumbent black has ever lost a reelection campaign. The test, however, is not merely who wins and loses, but whether incumbency helps to explain such wins and losses. The statistics indicate that the two blacks who were reelected as incumbents, Jordan and Green, did not benefit from incumbency. For example, Jordan's white support declined in both 1972 and 1976 from his first election in 1968. He was nonetheless reelected. Similarly, Green's white support declined from 1978 levels in the 1982 and 1986 election. However, he was reelected. Green even lost black support during the same period. Declining support, particularly among whites, is not a measure of the benefits

of incumbency. Instead, it raises a reasonable inference that these men were reelected based on a core constituency developed in their first election, not in the period of incumbency. The district court's finding on this point was not clearly erroneous.

The judgment of the district court was correct, and it should be affirmed. The majority opinion, in several respects, creates new law which I believe conflicts with the law of this circuit, the rule of *Gingles*, and the intent of Congress. For these reasons and the reasons stated above, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CASE NUMBER: CA-83-526-N

HERBERT M. COLLINS, ET AL

v.

CITY OF NORFOLK, ET AL

FILED

FEB 3 1988

CLERK, U.S. DISTRICT COURT
NORFOLK, VA

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this Court therefore finds that Norfolk's at-large system for the election of City Council members does not violate Section 2 of the Voting Rights Act, and judgment shall enter for the defendants.

February 3, 1988 — Date

DORIS R. CASEY — Clerk

/s/ Bonnie L. Day
Deputy Clerk Bonnie L. Day

A TRUE COPY, TESTE:
Doris R. Casey, Clerk

By /s/ Bonnie L. Day
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 83-526-N

HERBERT M. COLLINS, et al.,

Plaintiffs,

v.

CITY OF NORFOLK, et al.,

Defendants.

FILED

FEB 3 1988

CLERK, U.S. DISTRICT COURT
NORFOLK, VA

ORDER

This case is before the Court on remand from the Fourth Circuit Court of Appeals. Plaintiffs, Herbert M. Collins; Dr. H. Marks S. Richard; Barbara C. Parham; William E. Swindell, Jr.; Dr. Milton A. Reid; George Banks; Julian Hazel; and the Norfolk Branch of the National Association for the Advancement of Colored People (NAACP) sued defendants, the City of Norfolk, Virginia; the Norfolk City Council; City Council members Vincent J. Thomas, Joseph A. Leafe, Dr. Mason C. Andrews, the Reverend Joseph N. Green, Jr., Claude J. Staylor, Jr., Robert E. Summers and Elizabeth M. Howell; the City of Norfolk Electoral Board; and Electoral Board members Paul D. Fraim, Martha H. Boone, and Paul M. Lipkin, alleging that Norfolk's at-large system of electing City Council members improperly diluted black voting strength in violation of the Four-

teenth and Fifteenth Amendments to the United States Constitution, Amended Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and 42 U.S.C. § 1983.

I. Statement of the Case

The following facts were found by this Court at the original trial and were not disputed on appeal. Plaintiffs, except for the Norfolk NAACP, are black registered voters of the City of Norfolk. Plaintiffs Collins, Reid and Banks, and plaintiffs' attorney James F. Gay are unsuccessful candidates for election to the Norfolk City Council; Collins and Gay were endorsed in their unsuccessful campaigns by plaintiff Dr. Milton Reid, publisher of the newspaper, *The Journal and Guide*. They were not, however, endorsed by the Concerned Citizens of Norfolk (CCN), the then dominant black political organization in Norfolk. Plaintiff Swindell is an unsuccessful candidate for the House of Delegates from Norfolk. Plaintiffs Collins, Richard, Parham and plaintiffs' attorney Gay are former Norfolk City Democratic Committee members who were removed from their positions shortly before filing the instant action.

This Court entered judgment for the defendants, *Collins* v. *City of Norfolk*, 605 F. Supp. 377 (E.D. Va. 1984), holding that plaintiffs had failed to prove their claims under the Fourteenth and Fifteenth Amendments and Section 1983, and further holding that plaintiffs had failed to establish their vote dilution claim under the Voting Rights Act, Section 2 as amended, 42 U.S.C. § 1973.

The Fourth Circuit affirmed. *Collins* v. *City of Norfolk*, 768 F.2d 572 (4th Cir. 1985). Plaintiffs petitioned the United States Supreme Court for a Writ of Certiorari. One week after its decision in *Thornburg* v. *Gingles*, 106 S. Ct. 2752 (1986), the Supreme Court, without considering the merits of the case, remanded *Collins* to the Fourth Circuit "for further consideration in light of *Thornburg* v. *Gingles*." *Collins* v. *City of Norfolk*, 106 S. Ct. 3326 (1986). The Fourth Circuit remanded the case to this Court for

reconsideration of the issues of racial polarization, minority electoral success, candidate slating, and government responsiveness in the East Ghent redevelopment. *Collins* v. *City of Norfolk*, 816 F.2d 932 (4th Cir. 1987).

Plaintiffs did not appeal the disposition of their constitutional and Section 1983 claims, and these matters are therefore no longer before this Court. Plaintiffs now seek a declaratory judgment that the at-large system of electing Norfolk's City Council members unlawfully dilutes black voting strength; an injunction prohibiting the holding of future City Council elections under the at-large system; and the replacement of the at-large system with a system of wards or single-member districts. Except for the issues enumerated here and discussed below, this Court's findings in 605 F. Supp. 377 were unchallenged or were affirmed on appeal, and are therefore the settled law of the case.

A. Issues to be Determined on Remand

On remand, this Court must reconsider the following factors in light of *Thornburg* v. *Gingles*:

1. Whether analysis of the voting patterns of black and white voters over a period of years reveals legally significant racially polarized voting in the Norfolk City Council elections. 816 F.2d at 936 and 936 n. 3.

2. Whether black electoral success in Norfolk has been so consistent (and nearly proportional) as to overshadow any racially polarized voting and other factors tending to dilute minority access. 816 F.2d at 937.

3. Whether the success of a second black candidate in 1984, after the filing of this lawsuit, resulted from unusual circumstances, such as an attempt by white officials to forestall Voting Rights Act litigation. 816 F.2d at 938.

4. Whether any group of white citizens involved in the Norfolk City Council elections acted as a formal or informal slating organization, controlling access to the ballot,

and adversely affecting black citizens' access to the electoral process. 816 F.2d at 939.

5. Whether the removal of mostly black, low-income families from the East Ghent area of Norfolk was unresponsive to the needs of the minority community. 816 F.2d at 939.

B. Settled Factual and Legal Issues

The following findings of this Court were not designated for consideration on remand, are now the law of the case, and will not be reconsidered here:

1. Despite past acts of official discrimination, Norfolk's black citizens today participate in the electoral process equally with white citizens, and have higher registration and turnout rates than do whites. The procedures and facilities of the Registrar's Office are fair and are equally accessible to all of Norfolk's citizens. 605 F. Supp. at 385.

2. Norfolk has no unusually large election districts, majority vote requirements, anti-single shot provisions or other voting practices or procedures that might enhance the opportunity for discrimination against the minority group. 605 F. Supp. at 389-90.

3. Norfolk's black citizens are not hindered in their participation in the electoral process by socio-economic disparities in such areas as education, employment and health. 605 F. Supp. at 392.

4. Norfolk's political campaigns have not been characterized by either subtle or overt racial appeals. 605 F. Supp. at 393.

5. The at-large system in effect in Norfolk and in a large majority of other cities in Virginia is not the result of a tenuous state or local policy. 605 F. Supp. at 399.

Both plaintiffs and defendants having submitted briefs and memoranda, and oral argument having been heard on the matter, this case is now ready for determination.

For the reasons set forth below, the Court finds that the voting patterns in Norfolk do not reflect legally significant racially polarized bloc voting within the *Gingles* standard; that Norfolk's black voters have usually been able to elect their preferred candidates; that black electoral success in Norfolk has been so consistent and nearly proportional as to preclude a finding of vote dilution under Section 2 of the Voting Rights Act and to overshadow any racially polarized voting and other factors, if those factors had been found; that the success in 1984 of a second black candidate after the filing of this lawsuit did not result from unusual circumstances or from any action or inaction by white officials or political leaders tending to forestall Voting Rights Act litigation; that no group of white citizens involved in the Norfolk City Council elections acted as a formal or informal slating organization; that no such group controlled access to the ballot or adversely affected black citizens' access to the electoral process; and that the East Ghent relocation process was not unresponsive to the needs of the minority community. This Court therefore finds for the defendants on all grounds. All facts found in 605 F. Supp. 3771 and not disturbed on appeal are considered as established facts in this opinion.

II. Discussion of Issues on Remand

Much of the evidence overlaps between issues in this case. For the sake of clarity, the Court will not follow the sequence of issues on remand, but will arrange its discussion of issues by topic.

A. The 1982 Amendments to Section 2 Of The Voting Rights Act

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, prohibits any voting practice or procedure "imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."

A violation of this Section "is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See Thornburg* v. *Gingles*, 106 S. Ct. at 2759.

B. The Senate Report Factors

The Senate Report, S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in 1982 U.S. Code Cong. & Ad. News* 177, 179 [the Senate Report] which accompanied the bill amending Section 2, "espouses a flexible, fact-intensive test for § 2 violations." *Gingles*, 106 S. Ct. at 2764. At-large voting is not a *per se* violation of the Act, and the Act explicitly denies that any group is entitled to proportional representation. While the Senate Report provides that "[t]he extent to which members of a protected class have been elected to office" is one circumstance to be considered, the Report also provides specifically "[t]hat nothing in this Section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 106 S. Ct. at 2759-60.

Proof of discriminatory intent is not required to establish a violation of Section 2. Rather than provide a hard and fast test, the Senate Report enumerates the following "typical factors," derived from *White* v. *Regester*, 412 U.S. 755 (1973) and from the Fifth Circuit's opinion in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973), *aff'd sub nom East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (per curiam):

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles, 106 S. Ct. at 2759-60 and 2759 n. 4 (quoting S. Rep. at 28-29). A court must assess the impact of a contested structure or practice "on the basis of objective factors," such as the Senate Report factors. *Id.* at 2759-60 (citing S. Rep. at 27). However, it is not necessary that a certain number (or even a majority) of factors point one way or another. S. Rep. at 29.

C. Gingles v. Edmisten and Thornburg v. Gingles

Gingles v. *Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) *rev'd in part and aff'd in part sub nom Thornburg* v. *Gingles*, 106 S. Ct. 2752 (1986), establishes the standard for interpreting Section 2 and the Senate Report factors. In *Gingles*, black North Carolina voters sued various North Carolina officials, claiming that North Carolina's legislative districting scheme resulted in impermissible vote dilution and violated their rights under the Fourteenth Amendment to the United States Constitution, and under Amended Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Specifically, the *Gingles* plaintiffs alleged that the plan submerged black voting minorities in multi-member House Districts 36, 39, 23, 21 and 8; and multi-member Senate District 22. They further alleged that the plan fractured a geographical concentration of blacks between more than one Senate District, including Senate District 2, so that there was no effective voting majority of black citizens in any one district. 590 F. Supp. at 349-50.

The *Gingles* three-judge district court relied on the Senate Report factors in determining the statutory claims, applying the "totality of the circumstances" test set forth in Section 2(b). It found that the North Carolina redistricting plan violated Section 2 by diluting the black citizens' vote in all seven of the challenged districts. 590 F. Supp. at 376. *See also* 106 S. Ct. at 2760. The Supreme Court affirmed as to six of the districts, but a plurality of six Justices writing in three opinions reversed as to House District 23. Although the district court had found

violations of all but one of the Senate Report factors in that District, persistent black electoral success in District 23 precluded the plaintiffs from prevailing in that district. The plurality establishes that proportional representation bars a Section 2 claim. However, nothing in *Gingles* creates an entitlement to proportional representation, or establishes less-than-proportional representation as proof of a violation.

A comparison of the application of the Senate Report factors in *Gingles* and in *Collins* will therefore be instructive.

1. Lingering Effects of Past Official Discrimination and Discriminatory Voting Practices

The *Gingles* district court found a long history of official discrimination in North Carolina's State Senate and House elections, with poll taxes, numbered-seat plans and anti-single shot provisions in effect into the late 1960's. As late as 1970, a literacy test requiring black voters to read and write the Constitution was in effect in some North Carolina districts. 590 F. Supp. at 359-60. Since 1915, North Carolina had had a majority vote requirement for primaries, making it less likely that minority-preferred candidates could finally win elections. 590 F. Supp. at 363. As a result of this official discrimination, the district court found that, at the time of trial, "black voter registration remains depressed relative to that of the white majority," *id.* at 361, and that lingering effects of discrimination in facilities, education, employment, housing and health care continued to hinder North Carolina's black voters in their ability to participate effectively in the political process. *Id.* The court also found that the percentage of black registered voters in North Carolina was far below the percentage of blacks in the population. *Id.* at 357.

In Norfolk, by contrast, there is no majority vote requirement. Black voters exceed white voters in registration and turnout rates. 605 F. Supp. at 385. Despite an early

history of discrimination against blacks in Virginia, there are no lingering effects of discrimination in facilities, education, employment and health care affecting their ability to participate in the electoral process. *Id.* at 392. Norfolk's black citizens today participate in the electoral process equally with white citizens, and the procedures and facilities of the Registrar's Office are fair and equally accessible to all of Norfolk's citizens. *Id.* at 385. Norfolk has had no discriminatory voting practices at any time relevant to this litigation. *Id.* at 389-90.

2. Overt or Subtle Racial Appeals

Appeals to racial prejudice were prevalent in North Carolina's elections at the time of trial, and had been widespread and persistent for the past thirty years. 590 F. Supp. at 364. Some racial appeals by candidates and supporters were overt and blatant, while others were more subtle and furtive. *Id.* However, the specific examples of racial appeals in the North Carolina elections "reveal an unmistakable intention by their disseminators to exploit existing fears and prejudices and to create new fears and prejudices on the part of white citizens in regard to black citizens and to black citizens' participation in the political processes of the state." *Id.*

No such racial appeals were present in the Norfolk City elections. 605 F. Supp. at 392-93.

3. Whether the State's Policy is Tenuous

The Supreme Court found the policy behind the North Carolina plan to be tenuous. The policy behind Norfolk's at-large election system is not tenuous.

The *Gingles* redistricting plan, unlike the Norfolk at-large election plan, was put into place after the Voting Rights Act was passed. 590 F. Supp. at 350. The policy behind the original North Carolina plan was that no county should be divided, in accordance with the North Carolina Constitution. However, the revised redistricting plan at

issue in *Gingles* divided some counties. *Id.* at 351. In that case, where North Carolina had already abandoned the "no-division-of-counties" policy for some of the districts, any policy against dividing the remaining counties was clearly tenuous. "[S]uch a policy obviously could not be drawn upon to justify, under a fairness test, districting which results in racial vote dilution." *Id.* at 373-74. Norfolk's policy, on the other hand, "is consistent with both national and state practices for cities with the council-manager form of government" and is not the product of a tenuous policy. 605 F. Supp. at 399.

4. Legally Significant Racially Polarized Voting Under the Gingles Standard

Although all of the Senate Report factors are important, the *Gingles* district court identified as the "linchpin of vote dilution by districting" a pattern of racial bloc voting consisting of

> [t]he demonstrable unwillingness of substantial numbers of racial majority to vote for any minority race candidate or any candidate identified with minority race interests.

590 F. Supp. at 355 (citations omitted). The mere existence of an at-large plan, and the mere fact that blacks are a minority in a given multi-member district does not establish that vote dilution has resulted from the districting plan. *Id.* Nor is a showing that blacks are a voting or population minority in a multi-member district, nor a showing that "blacks have not been elected . . . in numbers proportional to their population" sufficient to establish a violation. *Id.*

While all of the Senate Report factors "may be relevant to a claim of vote dilution through submergence in multi-member districts, *unless there is a conjunction of the following circumstances*, the use of multi-member districts generally *will not impede the ability of minority voters to*

elect representatives of their choice." 106 S. Ct. at 2765-66 (emphasis added) (footnote omitted).

The *sine qua non* of a plaintiff's Section 2 vote dilution claim, as set forth in *Gingles*, is that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 2766 (emphasis in original) (citations omitted). It is "the usual predictability of the majority's success [that] distinguishes structural dilution from the mere loss of an occasional election." *Id.* at 2767 (citations omitted). In making this determination, courts are not to consider whether significant elements in the racial minority disagree with the plaintiffs' requested judicial remedy of single-member districts in which the racial minority constitutes a majority; whether creating "safe" black majority districts would perpetuate racial ghettos and racial polarization; or whether the remedy creates the risk of disrupting the normal processes of acquiring political power. 590 F. Supp. at 356-57 and 356-57 nn. 17-20, and authorities cited therein.

a. Threshold Considerations in Polarized Voting Claims

The theoretical basis for a Section 2 claim is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of the minority voters, and will minimize or cancel out the minority voters' ability to elect their preferred candidates. 106 S. Ct. at 2765.

"First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 2766 (footnote omitted).

"Second, the minority group must be able to show that it is politically cohesive." *Id.* at 2767.

"Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." It is "[i]n establishing this last circumstance, [that] the minority group demonstrates that submergence in a white multi-member district impedes its ability to elect its chosen representatives." It is the "usual predictability" of the majority's success that distinguishes vote dilution from the mere loss of an occasional election. *Id.*

In considering these circumstances under the *Gingles* standard, the Fourth Circuit noted that this Court should not consider causative factors such as backlash and field limitation in determining whether there is racially polarized voting. Rather, this Court

> should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidates—if so there is the requisite minority political cohesiveness—and to see *whether the majority vote is sufficiently homogeneous to cancel the minority vote plus the cross-over vote.* These inquiries together determine whether there is a "pattern of racial bloc voting that extends over a period of time," a critical factor in a claim of vote dilution under § 2.

816 F.2d at 935-36 (emphasis added).

As to the first consideration, the Court finds that Norfolk's black population is sufficiently large and geographically compact to constitute an effective voting majority of 65 percent in no more than two of the proposed wards. *See* 590 F. Supp. at 358 n. 21; *see also* Tr. 1661, 1702 (Testimony of William P. Robinson, Jr.).

While the Court recognizes that, in Norfolk, black voter registration and participation is far greater than in *Gin-*

gles, it is noteworthy that in *Gingles*, defendants' expert witness testified that a 65 percent black majority was necessary to create a "safe" black district, and that the Justice Department uses 65 percent as a benchmark for their administration of the Voting Rights Act. It is doubtful that establishing a ward system would produce a greater black presence on Norfolk's City Council than is already there.

Plaintiffs' Exhibit 52 sets forth plaintiffs' proposals for ward boundaries designed to give blacks three safe seats. The proposal sets 32,614 as the ideal population per ward. This excludes, however, the military population of 38,680—a larger segment of the population than that contained in any proposed ward. Additionally, none of the proposals provides for a 65 percent or better black population in as many as three wards. It is highly doubtful that a plan excluding military personnel, who are included in census figures, would pass constitutional muster. *See Reynolds* v. *Sims*, 377 U.S. 533, 563-68 (1964). If the military were included, none of the five proposals would have any validity.

As to the second consideration, the Court finds that the record is clear that Norfolk's blacks are politically cohesive. *See* Def. Ex. 470 (A-I) and 1986 Stip.

However, the Court finds, for reasons stated below, that Norfolk's whites do not vote sufficiently as a bloc that they usually defeat the minority's preferred candidate. The third element is therefore lacking.

b. White Bloc Voting: The Test for Legal Significance

The Supreme Court in *Gingles* did not set forth a "lucid explication of all features of the amended § 2," 816 F.2d at 935, nor did it establish a simple, doctrinal test for legally significant bloc voting. It did make clear that a mere preference for different candidates among voters of different races is not legally significant.

The *Gingles* district court found, based on statistical evidence presented by qualified experts, that blacks and whites generally preferred different candidates, and that the correlation between the voters' race and choice of candidates was "substantively" significant. 590 F. Supp. at 368. *See also* 106 S. Ct. at 2768. Under the Supreme Court's *Gingles* rule this establishes racially polarized voting, and is sufficient to show the cohesiveness of the black minority.

However, after a careful reading of the Supreme Court's *Gingles* opinion and the Fourth Circuit's opinion on remand, it is clear that polarized voting is not legally significant *unless the white bloc voting usually defeats minority-preferred candidates* despite the combined votes of blacks and white "cross-over" votes. The Supreme Court found that while the *Gingles* district court did not use the phrase "legally significant," the record was sufficient to show that the polarized voting in North Carolina met the *Gingles* test for legal significance. 106 S. Ct. at 2771 and 2771 n. 27.

The evidence relied on in *Gingles* included statistical studies of 53 elections between 1978 and 1982 in which black candidates ran. The *Gingles* district court found that in no North Carolina election, primary or general, did a black candidate receive a majority of white votes cast, and that an average of 81.7 percent of white voters did not cast any votes for any black candidates. White voters in the general elections consistently ranked black candidates last or next-to-last, except in heavily Democratic areas. There, white voters still rated blacks last or next-to-last among Democrats, if not last or next-to-last among all candidates. Furthermore, the district court found that in North Carolina approximately 66 percent of all white (Democratic) voters would not vote for a black Democrat even after the candidate had won the Democratic primary and the only alternatives were to vote for a Republican or no one. 590 F. Supp. at 368. (*Gingles* does not indicate

that there were any black-preferred candidates who were not black.)

Only "some" black incumbents were re-elected, and the black incumbents did not receive white majority support even when the election was uncontested. *Id.* at 368-69. The *Gingles* court noted that black participation in North Carolina's political process had recently increased markedly, but that

> [t]he participatory level of black citizens is still minimal in relation to the overall black population, and . . . is largely confined to the relatively few forerunners who have achieved professional status or otherwise emerged from the generally depressed socio-economic status which . . . remains the present lot of the great bulk of black citizens.

Id. at 372.

Similarly, in *City of Petersburg, Virginia* v. *United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), the United States District Court for the District of Columbia analyzed black and white voting patterns in Petersburg's at-large elections, to determine whether annexation of a predominately white area would impermissibly dilute black votes.

In *Petersburg*, the City sought a declaratory judgment under Section 5 of the Voting Rights Act to determine the validity of the proposed annexation, which would have increased the white population by almost 50 percent, and would have eliminated Petersburg's black population majority. The district court found that Petersburg had experienced a "dramatic polarization of the races," and also found "almost total bloc voting by race" in the Petersburg elections. *Id.* at 1025. In the all-white precincts, no more than 8.5 percent of the total vote was ever cast for black candidates in a given election, while in the black precincts

the combined total of all votes cast for white candidates never exceeded 19 percent. In contrast, white vote for white candidates never fell below 91 percent or black vote for black candidates below 81 percent. *Id.* at 1026 n. 10. Two black candidates had won separate elections while whites held a voting majority, but

> [w]hen there was a possibility that by re-electing [a black incumbent] and electing another black candidate, the black members would control the council, there was an unusually large turnout of white voters in the white wards, as a result of which [the black incumbent] was defeated and the second black candidate also lost.

Id. at 1026 (footnote omitted).

Similarly, in *City of Rome* v. *United States*, 472 F. Supp. 221 (D.D.C. 1979) (three judge court), *aff'd*, 446 U.S. 156 (1980), a black candidate defeated three whites in the primary but was defeated in the general election when whites, turning out in unusually high numbers, apparently "coalesced to defeat [the black candidate]" whose election appeared imminent. 472 F. Supp. at 227. The Supreme Court found that the black candidate's defeat in these circumstances was indicative of racial bloc voting. 446 U.S. at 184 n. 20. *See also Butts* v. *City of New York*, 614 F. Supp. 1527, 1545-46 (S.D.N.Y. 1985) (in the one election year where a minority candidate appeared on the run-off slate, he lost overwhelmingly to a white candidate in an election unusual for its high voter turnout).

The situation in Norfolk is quite different. In Norfolk, as discussed below, the white cross-over vote has combined with the black vote to elect the black-preferred candidates most of the time. Norfolk does not have the extreme and entrenched pattern of bloc voting found in *Petersburg*, *Gingles* and the other cases cited above.

It is undisputed that the Norfolk City Council elections are nonpartisan, at-large elections under a simple plurality

vote system, in which all candidates compete for open seats. The four-year terms for the seven-member council are staggered, so that every two years either three or four seats (and in one case, six) are available. Fields of candidates have ranged from eight to twenty-one, with an average of thirteen. These large fields tend to fragment whatever white bloc voting might occur, and work to the advantage of black voters, who tend to concentrate their votes. *See* Tr. 1968 (Testimony of Dr. O'Rourke); Def. Ex. 470 (A-I); 1986 Stip.

White cross-over voting for a black candidate has been above 20 percent in 70 percent of the Norfolk elections. In half of the elections, including the three most recent, white cross-over voting for a black candidate has exceeded 25 percent. Def. Ex. 474-A; 1986 Stip. White cross-over support in elections from 1968 through 1986 has averaged almost 25 percent for the 19 black-preferred candidates (that is, those candidates who received over 50 percent of the black vote in a given election). This is more of the white vote than over half of the white candidates have received. Def. Ex. 470; 474-A; 1986 Stip.

This 25 percent white cross-over vote is even more impressive when considered in light of the relative numbers of blacks and whites in the population. For example, a black candidate, such as Reverend Green, who received 92 percent of the black vote in 1978, received approximately 11,000 black votes. His actual 26 percent white cross-over vote means that approximately 5,600 to 5,700 white voters joined with the 11,000 blacks to ensure the success of the black-preferred candidate. *See* Def. Ex. 470 (A-I); 1986 Stip. Thus, he received approximately one-third of his total vote from white voters.

In Norfolk, black registration and turnout percentages have remained at or above the level for whites since 1980. 816 F.2d at 939; 768 F.2d at 574-75; 605 F. Supp. at 385, 402, 404. In *Gingles*, white cross-over vote was virtually

nonexistent, and even those black-preferred candidates who received the most white cross-over votes usually lost. In Norfolk, those candidates have usually won, as will be more fully discussed below.

The Court finds, based on the evidence presented, that in Norfolk's City Council elections, black-preferred candidates usually win, and that white bloc voting does not usually defeat the black voters' preferred candidates. Plaintiffs have failed to show that the at-large system "operates to minimize or cancel out" their ability to elect their preferred candidates. 106 S. Ct. at 2765 (citations omitted). They have therefore failed to meet the threshold test of Section 2, the establishment of legally significant, racially polarized bloc voting. Plaintiffs' Section 2 claim must fail.

5. Black Electoral Success Under The Gingles Standard

Although the election of a few minority candidates does not necessarily foreclose a vote dilution claim, the extent to which members of a protected class have been elected to office is one circumstance which may be considered. 106 S. Ct. at 2779 (citations omitted). This Court's duty is to conduct an independent consideration of the record and to make "a searching, practical evaluation of the past and present reality in determining whether [Norfolk's] political processes are equally open to all voters." *Id.* (citations omitted).

The Supreme Court in *Gingles* adopted what is in essence a new defense to a Section 2 claim: that roughly proportional minority electoral success will defeat a Section 2 claim even if such factors as racially polarized voting are present. Accordingly, the Fourth Circuit asked this Court to determine

> [w]hether, as a factual matter, black electoral success in Norfolk has been so consistent and nearly

> proportional as to overshadow any racially polarized voting and other factors tending to dilute minority political access.

816 F.2d at 937.

In making this determination, a comparison of black electoral success in the challenged North Carolina districts with black electoral success in Norfolk will be helpful.

a. Black Electoral Success in North Carolina and Norfolk

The *Gingles* court found a significant disparity between the electoral successes of blacks and of whites. At the time of trial (in 1984), North Carolina's black citizens constituted 22.4 percent of the State's total population, but held only 9 percent of the city council seats; 7.3 percent of county commission seats; 4 percent of sheriff's offices; and 1 percent of the offices of the Clerk of the Superior Court. There were 19 black mayors, 13 of whom were from majority black communities. Approximately 40 percent of the 9 percent of city council members who were black were from majority black municipalities or districts. Thus, in *Gingles*, only 5.4 percent of all city council members were blacks elected in areas where whites outnumbered blacks, although blacks made up 22.4 percent of the population. 590 F. Supp. at 365. In contrast, Norfolk's City Council is at present, and has been since the 1984 election, 28.5 percent black. This figure is far more nearly proportional to Norfolk's 35.2 percent black population than the 5.4 percent figure is to North Carolina's 22.4 percent black population. *See* 605 F. Supp. at 382.

Between 1971 and 1982, black representation in North Carolina's legislature ranged between 1.6 percent and 3.3 percent of the House seats, and 2 percent and 4 percent of the Senate seats, although the electorate was 22.4 percent black. 590 F. Supp. at 365. By contrast, from 1970 to 1982, Norfolk's City Council ranged from 14.3 to 28.6

percent black. More importantly, black voters in Norfolk between 1968 and 1986 elected their first or second choice 100 percent of the time, in fields of as many as 21 candidates. *See* Def. Ex. 470 (A-I); 1986 Stip. From 1970 to the present, Norfolk's City Council has included at least two, and sometimes three, members who were endorsed by black civic groups and who received majority black support. 605 F. Supp. at 400. All black incumbents who have run have been re-elected, a success rate of 100 percent, while the white incumbents' success rate has been only 80 percent. *See* Def. Ex. 470 (A-I); 1986 Stip.

In North Carolina, black-preferred candidates who won Democratic primaries in the challenged districts were three times as likely to *lose* the general election as were their white counterparts. 590 F. Supp. at 365. No blacks had ever been elected to the State Senate from the area encompassed by House Districts 2, 8, 23 and 39. *Id.* at 366. Only one black had been elected in this century to the State Senate in Senate District 22, and from the area encompassed by House District 21, although in the latter case the Senator was elected for two terms. *Id.* at 365-66. Through 1983 there were only one or two blacks at any time in the 50-member State Senate, a mere 2 percent to 4 percent, although blacks then constituted about 22 percent of the total North Carolina population. *Id.* at 365. In the area encompassed by Senate District 22, there had been a total of nine other black candidates, seven for the House, and two for the Senate, all of whom been defeated. *Id.*

In Norfolk, considering *all* candidates (and not just those who received majority support), 30.43 percent of all black candidates who have run for City Council since 1968 have won, compared with 29.24 percent of all white candidates. *See* Def. Ex. 470 (A-I); 1986 Stip.

North Carolina's black candidates for the State House of Representatives fared only slightly better than candi-

dates for the State Senate. From 1971 through 1982 there were never more than two to four blacks in the 120-member House of Representatives (a mere 1.6 to 3.3 percent of the House members). 590 F. Supp. at 365. No black Representative had ever been elected from House District 8, *id.* at 366, and only one from House District 36. *Id.* at 365. In House District 39, only one black Representative had ever been elected before the *Gingles* lawsuit. Two were elected after the suit was filed. *Id.* at 366. The court indicated that their election may have resulted from "unusual organized political support by white leaders concerned to forestall single-member districting . . . ." *Id.* at 367 n. 27. In House District 21, a black Representative was twice elected to the State House, and was serving at the time of trial. *Id.* at 366.

In House District 23 (Durham), however, one black citizen had been elected every two years since 1973 to the State House, and 25 percent (3 of 12) of the Durham City Council members were black. Durham is 47 percent black. *Id.* at 366. A plurality of the Supreme Court held that this steady pattern of success foreclosed plaintiffs' claims of vote dilution, notwithstanding that the black representation in Durham was not mathematically proportional. 106 S. Ct. at 2780 (Brennan, J.); 106 S. Ct. at 2783 (White, J.); 106 S. Ct. at 2793 (O'Connor, J.).

Apart from District 23, however, blacks did not fare well in city council elections in the challenged North Carolina districts. Black voters in Charlotte (House District 36; Senate District 32), for example, were 31 percent of the total population, yet were only 5.4 percent of the Charlotte City Council's at-large elected members before 1975. From 1977 to 1981, blacks won 28.6 percent of the district seats and only 16.7 percent of the at-large seats. 590 F. Supp. at 365.

Norfolk's blacks were 28.3 percent of the population until 1980, and approximately 35 percent since then. *See*

605 F. Supp. at 382; Def. Ex. 107 at Table P-1. Black-preferred candidates consistently held 28 percent of the City Council seats from 1968 to 1984, and presently hold 41 percent, all elected at-large. *See* Def. Ex. 470 (A-I); 1986 Stip.

After the *Gingles* trial, a black candidate was elected mayor of Charlotte, receiving approximately 38 percent of the vote. 590 F. Supp. at 366. In the area encompassed by House District 21, there had been a one-term black mayor in the early 1970's, and one black city council member. There was one black on the County School Board, one on the seven-member Board of County Commissioners, and a twice-elected black sheriff. In House District 36 (Senate District 22), one black citizen was elected three times and defeated once for the Board of County Commissioners. 590 F. Supp. at 365-66. Only two blacks had ever been elected to the Board of Education. In House District 39, one black had been elected, then defeated twice, then re-elected to the otherwise all-white, eight-member Board of Education. Another had been elected, then defeated, then re-elected to the Board of County Commissioners. *Id.* at 366.

In House District 8, a similar pattern emerged. There had been only two black members of the Board of County Commissioners in one of the three counties that comprise this district (both elected since 1982), and none in the other two counties. There was only one black Board of Education member, at the time of the *Gingles* trial, in a community that was 36.5 percent black. *Id.* at 366. The City of Wilson, North Carolina, located in House District 8, had one black councilman out of six, in a 40 percent black community. Likewise, in the area encompassed by Senate District 2, all black candidates who had run for the Halifax Board of County Commissioners and for the Roanoke Rapids City Council had lost. *Id.*

Based on the record summarized above, the district court in *Gingles* found that the overall results achieved to date by blacks at all levels of elective office in North Carolina were minimal in relation to the percentage of blacks in the total population. 590 F. Supp. at 367. This is not the case in Norfolk, as the evidence makes abundantly clear.

b. Statistical Models of Racial Voting Patterns

The City of Norfolk does not maintain voter registration or turnout figures by race, nor does the secret ballot permit observation of how a particular voter of a particular race voted. Tr. 721. Therefore, both plaintiffs and defendants used statistical estimates of voting behavior. 605 F. Supp. at 386. The only information from which these estimates can be drawn is the total number of people who register and vote in a precinct, and the total number of votes cast in a precinct for a particular candidate. These numbers are then applied to the precinct's racial composition, based on census data, in order to estimate how many blacks and how many whites voted for specific candidates. Tr. at 883-84.

The two standard statistical methods used to analyze group voting behavior are the "regression analysis" and the "homogeneous precinct", or "extreme case" analysis methods. Both were employed at trial, Tr. 1834-36, 1948, and both were acknowledged by the Supreme Court in *Gingles* as standard techniques for use in voting rights cases. 106 S. Ct. at 2768 n. 20.

The Fourth Circuit indicated that it believed that this Court did not admit plaintiffs' regression analysis into evidence. Plaintiffs' regression analyses were admitted into evidence as Exhibit P-50-b. Tr. 582. Nevertheless, this Court found that plaintiffs' studies contained serious methodological flaws which severely undercut their probative value. *See* 605 F. Supp. at 387. The Court of Appeals for the Fourth Circuit did not challenge this Court's finding of methodological flaws except to the extent that plaintiffs

may have been asked to isolate variables other than race. On remand, the Fourth Circuit only asks this Court to clarify its position on plaintiffs' methodology. *See* 816 F.2d at 936.

During discovery and trial, plaintiffs presented three statistical reports by Mr. Brace and Mr. Peterson, and one by Dr. Engstrom. *See* Def. Ex. 99, 103; Ex. P-50-b. Each employed regression analysis and each yielded different turnout, registration and vote totals for the same elections. For example, in 1978 by a homogeneous precinct analysis black incumbent Joseph Green received 32.2 percent of the white vote. Def. Ex. 470 (D). Plaintiffs' regression analysis yielded a figure of 20.2 percent in the first report, Def. Ex. 99; 18.7 percent in the second report, Def. Ex. 103; and 26.5 percent in the third report. Ex. P-50-b.

Again, using homogeneous analysis, Mason Andrews received 16.7 percent of the black vote in 1974. Def. Ex. 470 (F). Using plaintiffs' regression analysis, however, Andrews' percentage for that same election changed from 17.4 percent in the first report, Def. Ex. 99, to 9.4 percent in the third report. Ex. P-50-b.

The first report listed two black candidates as white candidates, contained errors in nomenclature, did not weight the computations to allow for differences in precinct size and excluded 38,000 mostly white, voting-age Navy residents. Tr. 475, 491-92, 495-96, 547 (Testimony of Carl B. Peterson). *See* Def. Ex. 99. Plaintiffs' second report, produced to replace the first report, repeated the errors in calculations and the errors in the race of two candidates. This report weighted all computations by voting age population, which plaintiffs' expert conceded was an error. The report still excluded 38,000 voting-age Navy residents. Def. Ex. 103; Tr. 495-520 (Testimony of Carl B. Peterson).

Plaintiffs' third report, produced four weeks before trial, weighted the data by precinct turnout, giving greater im-

portance to election results in precincts with higher turnouts. Again, the Navy residents were "put in a hypothetical, nonexistent precinct, to eliminate them." Tr. 475, 543 (Testimony of Carl B. Peterson).

The exclusion of approximately 38,000 predominately white, voting-age Norfolk residents residing on Norfolk's Navy bases or aboard ships home-ported in Norfolk (a full 17 percent of Norfolk's total population and a larger population than that of one of plaintiffs' "ideal" proposed wards), improperly skewed the results of their studies, inflating white registration and turnout figures, 605 F. Supp. at 387, and exaggerating the number of whites not voting for blacks. Tr. 527-28, 1842-43. The Fourth Circuit, in its first opinion, noted the impact of leaving out this large, mostly white population. 768 F.2d at 575 n. 6. These voters are eligible to run for office, are counted in the census figures for Norfolk, are considered by the State legislature in drawing House and Senate districts, and cannot properly be excluded from the voting calculations. Tr. 546, 1833; 605 F. Supp. at 387. This error was compounded in both the second and third reports by plaintiffs' further error of including as "white" the approximately 8,000 to 9,000 Norfolk residents who are neither white nor black. *See* 605 F. Supp. at 387, Tr. 498-99. One candidate's race was still wrong in the third report. Tr. 539.

Another serious flaw in plaintiffs' regression analyses was the use of "double regressions", which led to such impossible results as figures indicating that a candidate received fewer than zero votes, or more than 100 percent of all votes. Tr. 943-48. These impossible results were then "normalized" by the introduction of a "fudge factor". Tr. 551-52, 948. Plaintiffs' expert Dr. Engstrom admitted that he did not understand this "fudging" of figures. Tr. 948.

The fourth report, produced two weeks before trial, relied on data in the earlier reports, repeating the erroneous exclusion of the military, and including as white those

voters who were neither black nor white. Tr. 942. This last report considered only three elections, Tr. 984, and also contained certain methodological weaknesses. Tr. 1845-50.

These methodological flaws are distinct from the issue of causative factors, and go directly to the reliability of the figures derived, and to the reliability of conclusions drawn from those figures. While regression analysis, properly performed, can yield probative results, the Court finds that the methodological weaknesses of plaintiffs' regression analyses have so distorted the resulting participation and vote percentages for the various candidates that plaintiffs' studies, and evidence based on these studies, can have only minimal probative value in this matter.

This Court will, therefore, base its conclusions on the *plaintiffs' and defendants'* homogeneous precinct analyses, which agree as to the black precincts, and are extremely close as to the white precincts, and which do not contain the fundamental flaws the Court finds in plaintiffs' regression analyses. The Court should, however, consider all statistical testimony with caution. See, for example, the testimony of plaintiffs' expert Mr. Brace where he testified that if 100 percent of all white voters cast one of their four votes for a black candidate in a four-seat election, his table would show only a 25 percent white cross-over vote. Tr. 800.

c. Success of Black-Supported Candidates In Norfolk's Elections

The Supreme Court clearly contemplates that a "candidate of choice" of the black community may be of any race, and need not be black, as it consistently refers to the minority's preferred candidate, or candidate of choice, rather than the minority candidate. Four of the Justices would have so held. 106 S. Ct. at 2775 (Brennan, J.). Justice White disagreed that the candidate's race is *per se* irrelevant, and said it was not necessary to decide that

issue. 106 S. Ct. at 2783-84. Justice O'Connor, writing for four Justices, agreed with Justice White that the candidate's race was not always irrelevant, and also agreed that the Court need not decide the issue. 106 S. Ct. at 2793. No Justice said that a black-preferred candidate must be black. Plaintiffs' expert Dr. Engstrom concurred. Tr. 992. The black community's candidate of choice remains the candidate of choice even if he or she received white support, and even if the candidate could not have been elected without that white support. As Justice Brennan wrote for the plurality, "Under §2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important." 106 S. Ct. at 2776 (emphasis in original). This Court must, therefore, ask who are the black community's candidates of choice, and then ask whether white racial bloc voting usually defeats the combined black vote and white cross-over vote for these candidates.

i. Majority Black Support

More than half of all candidates receiving majority black support have been elected in the past eighteen years. Def. Ex. 470 (A-I); 1986 Stip.

With whites in Norfolk comprising two-thirds of the population, they could win every seat if they were in fact voting as a racially polarized bloc. On the contrary, the record indicates that between 1968 and 1986 white-preferred candidates have won only 25 of the 38 seats contested, or 65.79 percent. *See* Def. Ex. 470 (A-I); 1986 Stip. This success rate corresponds almost exactly with the proportion of whites in the population: 66 percent.

The substantial success rate of black-preferred candidates, electing 11 candidates for 38 contested seats (29 percent), is roughly equivalent to the proportion of blacks in the population (28 percent until 1980, and 35 percent after 1980). Def. Ex. 470 (A-I); 1986 Stip. Therefore, both races are electing their preferred candidates in numbers

roughly proportional to their percentages of the population.

More than half of all black-preferred candidates (11 of 19), and 100 percent of black incumbents, have won. In Norfolk City Council elections, whites have voted for black-preferred candidates in numbers sufficient to enable them to be elected. Tr. 1952-53, 1970-71 (Testimony of Timothy J. O'Rourke). In 1986, under homogeneous precinct analysis, black voters elected their first and third choices, while white voters elected their first, second and fourth choices. In 1986, Randy Wright was the white voters' third choice, under homogeneous analysis, with 60 percent of the white vote. (He was the whites' second choice under the 1986 stipulated regression figures, with 70 percent.) He lost the election because of a lack of black support, despite his preferred position among whites. 1986 Stip.

Plaintiffs' argument that candidates most preferred by the black voters were defeated in three of the five elections between 1974 and 1982 does not stand up to closer examination. The basis for their assertion is that their regression analysis, the defects in which are discussed above, purportedly shows that Mrs. Butts, who lost, received 93.1 percent of black-voter support and Reverend Green, who won, was second with 92 percent. However, plaintiffs' expert testified at trial that the election estimate figures were "too close to call." Tr. 917. In other words, the estimates for the two candidates were too nearly identical to afford grounds for plaintiffs' statement. If plaintiffs' own homogeneous analysis figures are used, however, Reverend Green is the first choice of black voters, over Mrs. Butts, which would produce three wins and two losses by black voters' first choice (a 60 percent success rate) for that period. *See* Ex. P-50-b.

Plaintiffs' reliance on Exhibit P-185 (Table 11), which purports to show that between 1974 and 1982 there have been twelve black candidates for Norfolk City Council, of

whom only three were elected, is also misleading. Six of the nine losing candidates, including plaintiffs Reid, Collins, Banks and plaintiffs' counsel Gay, were rejected by the black community, leaving only three candidates who received a majority black vote but lost the election. These three were actually only two individuals: Mr. Bond in 1974, and Mrs. Butts in 1980 and 1982. Tr. 805-09 (Testimony of Kimball W. Brace). Mrs. Butts lost in 1980 by only 405 votes, and still ran ahead of the white incumbent, Conoly Phillips, who was defeated. Tr. 1978.

The black community's first choice candidate has been elected in six of the eight elections since 1972 (the cut-off date used in *Gingles*), establishing a success rate of 75 percent for the candidate of first choice (or 78 percent if the 1968 election is included). If the black community's candidates of first and second choice are considered, the figure rises to a highly satisfactory 100 percent rate of success for first or second choice for the last eight consecutive elections. These results are even more probative of black electoral strength in view of the crowded fields of candidates in each election. *See* Def. Ex. 470 (A-I); 1986 Stip. The elections in Norfolk contrast sharply with the elections in *Gingles'* District 23, where half of the blacks elected were unopposed. 590 F. Supp. at 370. The Court finds unpersuasive, and indeed misleading, plaintiffs' argument that some black-supported candidates "lost in six of the eight City Council elections since 1970 and lost in all three elections held in the 1980's." *See* Plaintiffs' Memo on Remand at 38, Table 2. The record reflects, and this Court finds, that in each of the eight staggered term elections, at least one first or second choice black-supported candidate was elected; therefore, since 1974 there have been at all times at least two sitting Council members who received black majority support. *See* Def. Ex. 470 (A-F); 1986 Stip.

As the Fourth Circuit noted on remand,

> Unlike the situation in the disputed . . . districts at issue in *Gingles*, . . . black voter registration and turnout have recently increased in Norfolk. The district court acknowledged that fact, *see e.g.*, 605 F. Supp. at 402, 404, as did this Court in its first opinion, *see* 768 F.2d at 574-55. This factor is probative, but not dispositive, of black electoral participation, and there is no reason to believe that the district court viewed it as inordinately important.

816 F.2d 939.

At oral argument on remand, plaintiffs' counsel represented to this Court that the Fourth Circuit had settled the issue of black electoral success in Norfolk as a matter of law. Transcript of December 16, 1987 Oral Argument ("O.A.") at 59-60. Mr. Parker said, in response to questions from the Court, that the following language, which he quoted, was a ruling of law, binding upon this Court:

> The myriad numbers before this panel seem to indicate a consistent level of political success by Norfolk blacks that nevertheless is not as conspicuous as that achieved by the black community in North Carolina District 23.

816 F.2d at 937 (footnote omitted). Counsel argued that this language barred this Court from ruling on the matter. By omitting the sentence immediately following the portion he presented, and by omitting footnote 5, counsel seriously misstates the law of the case. The omitted sentence in the quoted passage makes it absolutely clear that the Fourth Circuit is not substituting its judgment on matters of fact for that of the District Court when it says:

> *On remand, the district court must determine* whether, as a factual matter, black electoral success in Norfolk has been so consistent and nearly proportional as to overshadow any racially po-

> larized voting and other factors tending to dilute minority political access.

Id. (emphasis added).

The omitted footnote further undercuts plaintiffs' interpretation of the Fourth Circuit's remand opinion:

> The question is not, however, so simple as how many blacks versus whites were elected. The court must examine the parties' studies of voting preferences to determine which were the preferred candidates of the majority and minority communities.

Id. at n. 5. Plaintiffs' counsel's selective citation did not stop there. Counsel also argued that the Fourth Circuit had ruled that several candidates who had received a majority of the black vote in particular elections could not, as a matter of law, be counted as examples of "minority electoral success." O.A. at 59-61. On this basis, plaintiffs' counsel would exclude Mrs. Howell and Mr. Staylor as candidates of choice in 1974, when Mr. Bond received more black votes than they did, but lost, and would exclude Mrs. Howell in 1980 when Mrs. Butts received more black votes but lost. *Id.* at 61.

In 1974, with CCN support, Mrs. Howell ran second out of twenty-one candidates among black voters, running ahead of three black candidates among black voters. In 1980, Mrs. Howell, with CCN endorsement, beat Mrs. Butts by over 2,300 votes, and received more than twice the black votes received by plaintiff George Banks. In 1984, Mrs. Howell again beat Mrs. Butts as a result of Mrs. Butts' decline in black support. Def. Ex. 470 (A, C, F). Delegate Robinson confirmed Mrs. Howell's black support. Tr. 1668.

Mr. Staylor, endorsed by CCN, received votes of 56.5 percent of all black voters in 1974, ahead of three black candidates, including plaintiff Milton Reid. Def. Ex. 470

(F). Delegate Robinson testified that Mr. Staylor was supported by blacks in 1974, Tr. 1667, and Judge Jordan testified that Mr. Staylor "had the overwhelming support of the black community when he first ran for Council." Tr. 1535. The evidence strongly indicates that Mrs. Howell in 1974 and 1980, and Mr. Staylor in 1974, were in fact candidates of choice of the black community and that any presumption created by the defeat of the first-choice candidates in those elections has been rebutted. Again, counsel misstates, by selective omissions, the law of the case, quoting that:

> The mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice.

O.A. at 61 (citing 816 F.2d at 937). When asked by the Court whether the quoted language is a presumption or a ruling of law, counsel said "[I]t is binding on this Court. It's a legal holding of the Fourth Circuit" O.A. at 59. Again, omitted language contradicts counsel's words. The paragraph concludes:

> Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

816 F.2d at 937. *See also id.* n. 6 ("[t]his may have been the case in the 1974 and 1980 elections in Norfolk . . ."). A presumption may be rebutted.

Based on this Court's detailed investigation of the particular factual circumstances of the elections at issue here, the Court finds that the presumption of nonrepresentation has been overwhelmingly rebutted as to the challenged candidates' status as chosen representatives of the minority voters.

ii. Endorsements by Black Civic Groups

Another indication of which candidates are the candidates of choice of the black community is the endorsement of certain candidates by black civic organizations.

The Concerned Citizens of Norfolk (CCN), is the leading black civic group involved in the elections at issue here. CCN has endorsed 25 candidates between 1972 and 1986, 15 of whom have been elected (60 percent). 605 F. Supp. at 400; 1986 Stip. Officials of CCN testified in favor of retaining Norfolk's present at-large City Council electoral system. Tr. 1632 (Testimony of Evelyn Butts); Tr. 1659-63 (Testimony of William P. Robinson, Jr.). In 1986, CCN endorsed four candidates, two of whom won. 1986 Stip.

CCN's position as the bellwether of black support is demonstrated by the election statistics for Dr. Mason Andrews. In 1978, Dr. Andrews, with CCN endorsement, received 43.5 percent of the black vote. In 1982, he lost that endorsement, and received a scant 5.8 percent of black support. Def. Ex. 470 (D and B). This figure rose to 38.4 percent in 1986 when CCN again endorsed him. 1986 Stip.

Plaintiff Dr. Milton Reid sought, but did not receive, CCN's endorsement in 1974, and failed to win even half the black votes. Plaintiff George Banks ran in 1980, in a field of twelve with one other black candidate. CCN endorsed the other candidate, Mrs. Butts, who received 92.9

percent of the black vote. Mr. Banks received only 36 percent. In 1982, plaintiff Collins and plaintiffs' counsel Mr. Gay each received less than 30 percent of the black vote without CCN support. 605 F. Supp. at 400. Likewise, in 1976 and 1980, G. Conoly Phillips ran without CCN endorsement, *see id.*, receiving 2.9 percent and 2.7 percent of the black vote in the respective elections. Def. Ex. 470 (C, E). With CCN endorsement in 1986, his support among blacks increased to 29 percent, without which he would have lost the election. 1986 Stip.

In 1982, plaintiff Swindell, a black, ran for the Virginia legislature from the predominately black 89th District, but lost to the white, CCN-endorsed candidate Robert Washington, after seeking and failing to receive CCN endorsement. Tr. 181-82 (Testimony of William E. Swindell, Jr.).

Additionally, Joseph Leafe, who was endorsed by CCN in 1984 but who did not receive black majority support, still received more black support with the CCN endorsement than did two black candidates who lacked that endorsement. 605 F. Supp. at 400.

At the time of trial, six of the seven City Council members were endorsed by CCN in at least one of their campaigns. *Id.* Plaintiffs' expert Dr. Engstrom conceded that four of the seven members of City Council as of July 1, 1984 could not have been elected without the support of black voters, and were accountable to the black community for their election. Tr. 1017. Five of the seven present Council members, all of whom were elected or re-elected in 1984 or 1986, could not have been elected without the black support they received. A sixth councilman, Paul Fraim, probably also depended on black voters' support. *See* Def. Ex. 470 (A-I); 1986 Stip. This dependence on black support necessarily reinforces the City Council's responsiveness to the particularized needs of the black community.

Another black endorsement group, the Rainbow Coalition, supported two candidates in the 1984 election, both of whom were elected. *See* Def. Ex. 470 (A); 480. In 1986, three of the four Rainbow Coalition candidates won. *See* 1986 Stip.

6. Special Circumstances Affecting Black Success

Because some apparent minority success may be due to special circumstances, the Court can appropriately take account of the circumstances surrounding any recent black electoral success in deciding its significance. 106 S. Ct. at 2780. The Supreme Court did not decide what types of special circumstances would demonstrate that apparent sustained minority success does not accurately reflect the minority's ability to elect its preferred representatives. *Id.* at 2780 n. 38. It merely held that blacks' political successes in some of the challenged North Carolina districts were not dispositive of plaintiffs' vote dilution claim because of unusual organized political support for blacks in those elections by white leaders concerned to forestall single-member districting. *Id.* at 2780 (citing 590 F. Supp. at 367).

The *Gingles* trial court noted in passing, and discussed in a footnote, what it termed the "obviously aberrational aspects" of the most recent North Carolina elections, which tended to cast doubt on the validity of the apparent gains made by North Carolina's black citizens in achieving success at the polls. Although the district court did not enumerate specific examples, the court emphasized evidence of "unusual organized political support by white leaders concerned to forestall single-member districting" in elections during the pendency of the litigation, noting that because "this cannot be expected to recur" the validity of black candidates' apparent success in the recent elections is "a matter of sheer speculation." 590 F.2d at 367 and 367 n. 27.

The *Collins* plaintiffs argue that every successful black candidate in the last twenty years has won due to special

circumstances, and that therefore none of these victories should be considered a black electoral success. A comparison of the circumstances in *Gingles* with those in Norfolk will therefore be helpful.

The district court in *Gingles* said that North Carolina's recent history gave intimations that a "more substantial breakthrough of success could be imminent," but stated, as noted above, that "there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation." *Id.*

The court said:

> In any event, the success that has been achieved by black candidates to date is, standing alone, *too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunities* to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state—either generally or specifically in the areas of the challenged districts.

590 F. Supp. at 367 (emphasis added).

Writing for the *Gingles* Court, Justice Brennan noted that the trial court could properly take into account the fact that the pending litigation could have artificially boosted black candidates' success in 1982, indicating in a footnote that this success could have been engineered by white politicians in order to block the litigation. 106 S. Ct. at 2780 and 2780 n. 37 (citation omitted). An additional exceptional circumstance occurred in the 1982 State House election in Durham County. Although the black candidate won one of the three available seats, there were only two white candidates, making the black candidate's victory a certainty. 590 F. Supp. at 368 n. 31.

This Court finds none of these aberrational factors in Norfolk's City Council elections, but will address each of plaintiffs' allegations in turn.

a. Mayor Thomas' Support for Reverend Foster

Plaintiffs' Memo on Remand suggests that black School Board member Reverend John Foster's election to City Council in 1984 was the result of "special circumstances" and was therefore was not probative of black electoral success. The alleged "special circumstances" were the former Mayor's decision not to seek re-election and to back a black candidate, and his remark that this case might become moot after the election.

This Court earlier found that former Mayor Vincent Thomas' decision not to seek re-election was not part of any conspiracy to elect John Foster and thereby to moot the instant lawsuit. 605 F. Supp. at 393. However, in its directions on remand, the Fourth Circuit stated that even in the absence of a conspiracy, "if voting patterns show unusual white support for the black candidate [Foster] in 1984, the legal significance of his success should be diminished." 816 F.2d at 938 (citations omitted). The Fourth Circuit therefore requested that this Court "examine the result of [Former Mayor Thomas'] conduct and statement," adding, "As long as that particularized investigation is made, however, the trial court's findings should not be disturbed on appeal unless they are clearly erroneous." *Id.*

It is clear from a comparison with *Gingles* that in the Norfolk elections there was no "obviously aberrational" pattern of white support such as that which occurred in the North Carolina elections. Neither Mayor Thomas' "mootness" remark nor his decision not to seek re-election in 1984 and to support a black candidate for election resulted in unusual white voting patterns in that election. Nor did his actions or inactions, or, indeed, the pendency of this lawsuit, have any other effect on the 1984 elections

that would tend to diminish the probative value of black electoral success in that election.

Mayor Thomas testified that his support for Reverend Foster predated the commencement of plaintiffs' suit and that his decision not to seek re-election was for personal reasons. Plaintiffs produced no credible evidence to the contrary. There was no evidence that Mayor Thomas or any other white city officials or community leaders "orchestrated" Reverend Foster's election. The Court finds no evidence that Mayor Thomas' words and actions affected the 1984 elections in any way that would violate the Voting Rights Act.

There was no evidence of unusual white voting patterns in the 1984 election. In the 1984 City Council elections, ten candidates competed at-large for three available seats. There were two strong black candidates, Reverend John Foster and Evelyn Butts, but the white voter turnout was lower in 1984 than in any of the three previous elections. The percentage of white registered voters who turned out to vote was substantially lower than the percentage of black registered voters who turned out to vote. *See* Def. Ex. 470 (A); 605 F. Supp. at 386.

Neither Reverend Foster, who was elected, nor Mrs. Butts, who was not, received unusual white support in 1984. Reverend Foster received 26.6 percent of white support, and Mrs. Butts received 24.2 percent. This was less than the white support given Joseph Green in 1982 (31.1 percent) and in Green's first election in 1978 (32.2 percent). It was also less than the percentage of whites voting for Joseph Jordan in his first election in 1968 (28.7 percent). Indeed, it appears that had Mrs. Butts not lost a great deal of black support (down from approximately 93 percent in 1980 to approximately 72 percent in 1984) she, too, would have been elected to City Council, raising black incumbency to three of seven members. Her narrow defeat by a 400-vote margin cannot be attributed to white bloc

voting nor to any other factor than her decline in support among black voters. *See* Def. Ex. 470 (A-I).

Thus, while at least 26.6 percent of the white voters were willing to vote for one black candidate and at least 24.2 for the other, they did not turn out in unusual numbers, nor did they channel their support to the candidate allegedly picked by Mayor Thomas. The votes for Butts and Foster showed roughly the same geographic distribution, and this distribution was similar to the vote distribution for Reverend Green in 1982. *See* Def. Ex. 475 (A and B); Def. Ex. 476. All in all, the election of a black in 1984 was consistent with past three-seat elections. In four of the five three-seat elections since 1968, a black candidate has been elected. 605 F. Supp. at 389.

b. The "Westside Coalition"

Plaintiffs also argue that the 1984 election was unique because the so-called "westside business coalition" allegedly left one seat open for Reverend Foster by running only two white candidates. This is merely a variation on the previous argument: that white officials somehow engineered Reverend Foster's election. The evidence, discussed above, simply does not support such a finding. Plaintiffs' argument is weakened further by their reliance on testimony by Dr. Engstrom, who did not study the 1984 election in his polarization study, Tr. 1006, and who never studied political endorsements. Tr. 1000. The Court notes that notwithstanding the alleged absence of a third white candidate on the "business" ticket, there were, in all, six white candidates in the 1984 election. The Court finds that Foster defeated four white candidates because of his strong following in the black community. The Court therefore finds that the 1984 election was not aberrational, was not the result of special circumstances, and was not the result of any action or inaction of Mayor Thomas or any other white citizens or officials, singly or in combination.

The results of the 1986 election, in which there were at least four strong white candidates for four Council seats, bear out the finding that the 1984 election was not aberrational. In 1986, Reverend Joseph Green won re-election, although four candidates received more white votes than he did, maintaining black representation on City Council at two of seven seats. He placed second in overall votes, defeating at least one white candidate (Wright) who received over 60 percent of the white vote. Far from being an aberration, this pattern of black electoral success built upon strong black community support, CCN endorsement (and more recently, Rainbow Coalition endorsement), and a steady white cross-over vote is indicative of the non-polarized nature of Norfolk's City Council elections.

c. Lack of an Opponent

The Court likewise finds that, contrary to plaintiffs' suggestions, there has been no Norfolk City Council election in which a black candidate won because there was no white opponent. In such a case, the election of the black candidate would certainly be the result of special circumstances, and therefore less probative of black electoral success. In *Gingles*, for example, there were several elections in the challenged North Carolina districts in which black candidates won because there were fewer white candidates than there were seats available. Necessarily, one black candidate had to be elected. *See* 106 S. Ct. at 2772 n. 29; 590 F. Supp. at 369-70. The Supreme Court noted that the absence of an opponent might constitute a special circumstance that would explain apparent black electoral success. 106 S. Ct. at 2772. However, in two decades such a situation has not presented itself in Norfolk. On the contrary, blacks have consistently won, even when there were enough white candidates to fill the available seats several times over.

d. Incumbency

Likewise, Reverend Green's incumbency at the time of the 1986 election does not make his re-election an aberration. In *Gingles*, the Supreme Court found that a successful minority candidate's incumbency could be a special circumstance, like the lack of an opponent, "bullet" voting, or other unusual factors, and that an incumbent's re-election did not necessarily negate a finding that racially polarized bloc voting usually defeated the black-preferred candidates. *See* 106 S. Ct. at 2770, 2772 and 2772 n. 29. The Supreme Court did not rule that re-elected incumbents must not be counted in evaluating blacks' overall electoral success. It merely ruled that sporadic black successes do not outweigh a pattern of black losses due to polarized white voting, such as the Supreme Court found in *Gingles*. In Norfolk, incumbency is one predictor of victory, to be sure: as previously shown, the re-election rate of black incumbents is 100 percent, which is greater than that of whites. Moreover, in Norfolk, unlike North Carolina, black-preferred candidates do not usually lose; they usually win. That some of the winners were incumbents does not negate the overall pattern of black success in Norfolk elections. The consistent willingness of white voters, as well as black, to re-elect black incumbents and to elect other blacks clearly shows that white bloc voting will not consistently defeat minority candidates in Norfolk.

e. Appointment of Joseph Green

Plaintiffs also argue that Joseph Green's appointment to fill the vacancy left by Joseph Jordan's appointment to the bench was another "special circumstance" within the *Gingles* standard. This argument is also without merit. When Reverend Green ran for election for the first time, in 1978, he received 96.1 percent of the black vote, and was elected, although he came in sixth with white voters and only five seats were available. Although he received a solid base of white support (32.2 percent), this was not

significantly greater than the 28.7 percent of white support given Joseph Jordan in his first election in 1968, or the 26.6 percent given John Foster in 1984, although neither Jordan nor Foster was previously appointed. *See* Def. Ex. 470 (A, D and I). It is evident that no unusual white support resulted from Reverend Green's appointment.

Green's appointment and subsequent election presents a far different situation than that in *United States* v. *Marengo County Comm'n*, 731 F.2d 1546 (11th Cir. 1984) cited by plaintiffs. In *Marengo*, no black candidate had ever been elected. The one black citizen appointed to the School Board had never faced election. *Id.* at 1572. In those circumstances, the Eleventh Circuit said, "The appointment of one black to the School Board . . . certainly does not demonstrate the ability of black voters to elect officials," and added "[n]either would his subsequent *unopposed* re-election." *Id.* and 1572 n. 47 (emphasis in original). The *Marengo* decision is thus clearly inapposite to the instant case, where black candidates have regularly run for office and won election in hotly contested campaigns with large fields of candidates.

The other case upon which plaintiffs rely, *McMillan* v. *Escambia County, Florida*, 638 F.2d 1239 (5th Cir. 1981), is likewise not pertinent to the present inquiry. In *McMillan*, two blacks were appointed to the Pensacola City Council, and both subsequently won re-election, although no black had previously been elected. One of the two appointees had previously run and been "soundly defeated by the usual white bloc vote." *Id.* at 1241 n. 6. These two exceptions did not, however, negate the general pattern of total black electoral failure in Pensacola and in Escambia County. *Id.*

It does not follow that, because Reverend Green was originally appointed to fill Judge Jordan's vacated seat, his subsequent decade of successful re-election campaigns in which he received 96.1 percent, 88.2 percent and 90.3

percent of black voter support should be disregarded or treated as an aberration. On the contrary, based on this Court's careful examination of the factual circumstances of each election under consideration here, it is clear that Reverend Green's electoral success is legitimate and is not the result of special circumstances as contemplated in *Gingles*.

f. Single-Shot or Bullet Voting

Plaintiffs' allegation that the at-large system vitiates black electoral success by forcing black voters to cast fewer votes than are available to them (that is, to use "single-shot" or "bullet" voting) is likewise without merit. The Supreme Court noted, as discussed above, that "bullet" voting may be a special circumstance that will explain an occasional black success in the face of racially polarized bloc voting. *Id.* at 2770. The Court also quoted the Senate Report's conclusion that "anti-single shot" restrictions may violate Section 2. *Id.* at 2759.

The Supreme Court did not, however, say that use of single-shot voting was probative of a violation. Norfolk's black voters have on occasion successfully employed single-shot tactics. 605 F. Supp. at 389. It is abundantly clear, however, that it has not been necessary for blacks to depend on single-shot voting to win. While Norfolk's black voters generally trail white voters slightly in numbers of votes cast per voter, in 1976 and 1982, with more white candidates running than seats available, black voters cast slightly more votes per voter than did white voters, and successfully elected their preferred candidates without single-shot tactics. *See* Def. Ex. 470 (B and E) and 472.

Norfolk has no restrictions on single-shot voting. This Court, therefore, finds that black electoral success has not been adversely affected either by restrictions on single-shot voting or by a need to rely on single-shot voting.

7. The Proportionality of Black Representation

The next question is whether black representation on Norfolk's City Council has been so nearly proportional as to preclude relief under Section 2 even if there were legally significant, racially polarized voting.

In *Gingles*, a black-supported candidate had won in every election held in House District 23 (Durham) from 1973 through 1982. 590 F. Supp. at 366. The district court nevertheless found a Section 2 violation based on its determination that House District 23 was deficient in all but one of the Senate Report factors, 590 F. Supp. 345, including the fact that three of the six successful black candidates were unopposed. *Id.* at 370.

The United States Supreme Court reversed, saying, "This persistent proportional representation is inconsistent with [the] allegation that the ability of black voters in district 23 to elect representatives of their choice is not equal to that enjoyed by the white majority." 106 S. Ct. at 2780 (Brennan, J.) (plurality).

Although this portion of *Gingles* was a plurality opinion, Justice Brennan was joined in reaching this conclusion by Justices White, Burger, Powell, Rehnquist and O'Connor. Writing for four of the Justices, Justice O'Connor noted

> Blacks comprise 36.3% of the population in [District 23], and constitute 28.6% of the registered voters. In each of the six elections since 1970 one of the three representatives from this district has been a black .... Indeed, the 23 Court of Appeals' decisions on which the Senate Report relied, and which are the best evidence of the scope of this caveat, contain no example of minority electoral success that even remotely approximates the consistent, decade-long pattern in district 23.

Id. at 2794-95 (O'Connor, J., concurring in part). Thus, under *Gingles*, a Section 2 claim will be defeated if the black community is proportionally represented, notwithstanding any other factor. This holding does not create an entitlement to proportional representation, which is expressly denied by the language of Section 2.

On remand, this Court must determine as a factual matter whether black electoral success in Norfolk "has been so consistent and *nearly proportional* as to overshadow any racially polarized voting and other factors tending to dilute minority political access." 816 F.2d at 937 (emphasis added). The Court finds that it has been.

As in District 23, candidates supported by a majority of black voters have won in every Norfolk election since 1972, and even earlier (1968). Since 1972, the Council has at all times had at least two members (28.6 percent) and in some years three members (42.9 percent) who had been supported by a majority of black voters in their last election. Further, from 1972 to 1986, black-preferred candidates in Norfolk have won an average of 34.5 percent of the City Council seats. The figures for black-supported candidates include Mrs. Howell and Mr. Staylor in 1974, and Mrs. Howell in 1980, who were candidates of choice of the black community in those particular elections, as the Court found above. These percentages are derived by averaging the percentage of seats won since 1972. *See* Def. Ex. 470 (A-G); 1986 Stip. If each election is averaged separately, the percentage of seats won by black-preferred candidates is 34.2 percent. This figure is still roughly proportional to the 1980 total black population figure of 35.2 percent, and it exceeds the 1980 black Voting Age Population (VAP) of 31.5 percent, as well as the 1970 figures for both VAP (24.1 percent) and total population (28.3 percent). *See* 605 F. Supp. at 382; Def. Ex. 107.

This Court finds as a factual matter that blacks in Norfolk have had roughly proportional representation for

longer than the time considered relevant for District 23 in *Gingles*, and holds as a matter of law that this finding of fact precludes relief under Section 2.

8. Slating

In the original *Collins* opinion, this Court found plaintiffs' contention that Norfolk City Council elections have been controlled by the "westside businessmen's coalition" to be unsupported by credible evidence. The Court held, "[P]laintiffs failed to prove the existence of a candidate slating organization which denies black candidates access to the process." 605 F. Supp. at 391.

The Fourth Circuit, in remanding the case, took exception to this Court's definition of a candidate slating process. The Appeals Court held that a definition of a slating group as a group which offers candidates for *all* slots on the ballot was overly restrictive. 816 F.2d at 938-39. The Fourth Circuit stated, "[T]he fact that the alleged slating group in Norfolk sometimes endorsed candidates without giving endorsements for all available seats might be a *factor* in finding that it was not a slating organization that denied access to minorities, that fact does not contravene the Senate Report factor as a matter of law." *Id.* at 939 (emphasis in original).

Accordingly, this Court now reconsiders the evidence in the record related to the existence of slating, and the arguments presented by both sides in light of the Appeals Court's definition of slating.

a. Indicia of Slating in Norfolk

The existence of slating is significant because it is one of the factors to be considered in determining whether or not there has been a violation of Section 2 of the Voting Rights Act. The Senate Committee on the Judiciary described the factor as follows:

> [I]f there is a candidate slating process, whether the members of the minority group have been denied access to that process

S. Rep. at 28-29.

In their memoranda on remand, plaintiffs contend that the record clearly shows that black voters in Norfolk were denied access to the candidate slating process of the westside business coalition during the 1976 and 1980 elections. Plaintiffs argue that during these elections the alleged slating group "recruited, ran and supported slates of successful (except for Phillips in 1980) white candidates in the 1976 and 1980 city council elections, and that they excluded any black candidates from their slates of candidates." Plaintiffs' Reply Brief at 29.

Plaintiffs claim that in the 1976 Norfolk City Council election, the westside business coalition put up a slate of candidates consisting of Vincent Thomas and G. Conoly Phillips, and that Joseph Jordan, a black candidate, was "excluded because of his race." The only evidence plaintiffs point to in support of this conclusion is the deposition testimony of Vincent Thomas. The following deposition excerpt was quoted in plaintiffs' brief:

> A. I had some talks with Judge Jordan about the general political situation in Norfolk. But no, there was no consideration of a ticket including Judge Jordan.
>
> Q. Why not?
>
> A. This was the political decision that was made at the time.
>
> Q. And why was that political decision made? What was some of the reasoning behind it?
>
> A. The reasons were political reasons. We felt that our primary goal was to get elected. We wanted to have as many things in our favor to

get elected as possible. And so the decision was made that our best interest would be served by running the two of us in association.

Q. Do you feel it would hurt your ticket if you had included Judge Jordan?

A. At the time, that was just not a reasonable political possibility.

Q. What was not a reasonable political possibility?

A. Running the three as a ticket.

***

Q. I'm trying to understand your testimony, Mayor. What was not a reasonable political possibility?

A. That there be a ticket of Mr. Phillips, Judge Jordan and myself.

Thomas Deposition at 20-22.

What plaintiffs failed to include in their brief is the following exchange, which occurred between the quoted portions above.

Q. So it was not a reasonable political possibility at the time to include a black on a ticket with two whites; is that right?

A. I didn't say that. I said under the circumstances that were then in Norfolk and the candidates involved, that that was not a possibility.

Q. Not a possibility to include a black on your ticket:

MR. CHAPPELL: That is not what he testified to. You keep coming back and testifying yourself, Mr. Parker. I object to the form of your question.

Id. at 21.

Seemingly, plaintiffs' attorney was attempting to have Mr. Thomas say that Mr. Jordan was excluded from the ticket on the basis of his race. In their brief on remand, plaintiffs conclude, "[T]he slating group believed that including a black candidate on the slate would compromise their 'primary goal,' which 'was to get elected.' " Plaintiffs' Reply Brief at 28. Plaintiffs offer no evidence to substantiate this bald assertion. The deposition testimony quoted in plaintiffs' brief took place in the context of discussing the inclusion of Joseph Jordan on the ticket with Vincent Thomas and Conoly Phillips. Even if, as plaintiffs allege, someone involved with the Thomas-Phillips ticket made a conscious decision not to include Joseph Jordan on the ticket, it does not necessarily follow that all blacks were discriminatorily denied access to a slating process. Indeed, in the 1976 Norfolk City Council election there were a number of other candidates who were also not included on the Thomas-Phillips ticket. Characterizing Mr. Thomas' deposition testimony as evidence of a discriminatory slating process requires drawing a number of inferences that are not supported by the evidence.

With respect to the 1980 election, plaintiffs claim, "proof shows that the Thomas-Phillips-Leafe ticket was a slate [from] which black candidates were excluded, and that the slate was identified as a business community ticket." Plaintiffs' Reply Brief at 28. In their brief, plaintiffs also make the statement, "Thomas admitted that in 1980 no consideration was given to including a black candidate in the Thomas-Phillips-Leafe slate." *Id.* at 28-29. The portion of Mr. Thomas' deposition testimony plaintiffs apparently rely on for this statement is as follows:

> Q. Was there any consideration given by either you or, to your knowledge, Mr. Phillips, to recruiting a black to be on the ticket in 1980?
>
> A. I cannot remember specifically, except to say that in the political discussions, everything is normally considered.
>
> Q. But you cannot specifically recall any specific consideration given to including a black?
>
> A. No. Well, let me—at the time we were interested in having qualified people on the Council, yes.
>
> Q. Well, what does that mean?
>
> A. Well, that means that we considered everybody.
>
> Q. But you did not specifically discuss including a black person?
>
> A. I really just can't recall that.
>
> Q. Was there any reason why you did not give active consideration to including a black person?
>
> A. I can't recall that, either.

Thomas Deposition at 37-38. A careful reading of the testimony shows that Mr. Thomas did not "admit" that a black candidate was not considered.

In a similar vein, plaintiffs claim that Joseph Leafe's deposition testimony confirms that no consideration was given to a black candidate. Plaintiffs' Reply Brief at 28-29. The testimony cited by plaintiffs to support their assertion is as follows:

> Q. Did you give any consideration to including a black person on your ticket?
>
> A. Well, I guess my answer is that I didn't have any input into the—I became the third person.

So at that point in time, you know, there weren't any considerations left.

What considerations they may have had before that, I just really couldn't speak to.

Q. So you don't know of any considerations that might or might not have been given to include a black?

A. No, I didn't.

Leafe Deposition at 67. As with the testimony of Mr. Thomas, the testimony of Mr. Leafe simply does not support plaintiffs' conclusion that no black candidate was considered.

Defendants contend, on the other hand, that Norfolk had no slating group or process that adversely affected the representation of blacks on the Norfolk City Council. In its earlier opinion, this Court, citing *McIntosh County Branch of the NAACP* v. *City of Darien*, 605 F.2d 753 (5th Cir. 1979), described various courts' concern with slating groups as "whether a small group of whites, acting as a formal or informal slating organization, effectively limits the ability of blacks to seek electoral office by excluding black candidates from its slating process." 605 F. Supp. at 403-04. Defendants argue that the situation in Norfolk, of which plaintiffs complain, if it was slating at all, is not the offensive type of slating discussed in the Senate Report and in case law, and that Norfolk blacks have not been disadvantaged by a discriminatory slating process.

b. Effects of Alleged Slating on City Council Elections

After considering all the evidence, this Court finds a number of factors relevant to its consideration of the slating issue. Initially, it is important to note that the influence of the alleged slating group in Norfolk City Council

elections is relatively small. In the ten elections held between 1968 and 1986, there have been a total of 38 City Council seats available. Yet, plaintiffs allege offensive slating in only two nonconsecutive elections. Furthermore, these instances of alleged slating involved only five slots and three individuals: Vincent Thomas, Conoly Phillips and Joseph Leafe.

In 1976, one of the years in which plaintiffs allege slating, Joseph Jordan, a black, won, coming in third among white voters and beating seven white candidates, two of whom were incumbents. Def. Ex. 470 (E). While the Court of Appeals stated that failing to endorse a full slate does not preclude the possibility of a group being a slating group, a partial slate may be a factor to consider. 816 F.2d at 939. With respect to the 1976 election, it is certainly relevant that the alleged slating group filled only two of three available seats and a black candidate prevailed over numerous white candidates for the third seat.

This Court made the following unchallenged findings concerning the 1980 election in the original *Collins* decision.

> With regard to the 1980 election, Joseph Leafe testified that he was asked to run by then Mayor Thomas. Leafe had decided not to run again for the Virginia House of Delegates, in which he had served as a member from 1972 to 1980. Leafe stated that he did not have discussions with either Joshua Darden or Harvey Lindsey, identified during the trial by the plaintiffs as leaders of the "westside businessmen's coalition," before he decided to run. Leafe was not recruited to run by any single group; rather he was encouraged to run by voters from throughout the City. Leafe ran with Thomas and Phillips in 1980 and the three shared election expenses. They did not consider themselves to be a businessmen's slate.

> Leafe and Thomas were elected; Phillips was not. There is no evidence that the three candidates were recruited by a slating organization. It is more likely that the two incumbents, who had run together successfully in the 1976 election, sought a third candidate who shared their stance on the issues and who would be willing to share campaign expenses.

605 F. Supp. at 390-91.

The 1980 election results support the conclusion that the alleged westside businessmen's slating group did not control the City Council elections and did not deny blacks access to the process. In the 1980 election, the candidate who received the greatest number of votes, Mrs. Howell, was supported by CCN, but not by the westside businessmen. *See id.* at 400; Def. Ex. 470 (C). Conoly Phillips, an incumbent and member of the alleged westside slate, was not re-elected and received fewer votes than black candidate Evelyn Butts. Significantly, following the 1980 election only two of seven members of the Norfolk City Council had been supported by the alleged westside business slating group. *See* Def. Ex. 470 (C).

c. The Supreme Court's Interpretation of the Significance of the Slating Factor

In remanding *Collins*, the Fourth Circuit conceded that there is "no consensus in federal law or in political science texts on a definitive meaning of the phrase 'slating group.' " 816 F.2d at 938. However, the Court did cite two Supreme Court cases, *White* v. *Regester* and *Whitcomb* v. *Chavis*, which it considered important sources for the phrase "slating group."

In *White* v. *Regester*, a voting rights case, the Supreme Court required the plaintiffs to prove that members of the group in question "had less opportunity than did other residents in the district to participate in the political proc-

esses and to elect legislators of their choice." 412 U.S. 755, 766 (1973). In *White*, the district court had found that the Dallas Committee for Responsible Government (DCRG) was a "white-dominated organization that [was] in effective control of Democratic Party candidate slating in Dallas County." *Id.* at 766-67. The lower court had also found that without the endorsement of DCRG it was "extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination." *Id.* at 767 n. 11. Finally, the lower court found, and the Supreme Court affirmed the finding, that because of the black community's exclusion from participation in the Democratic Party selection process, blacks had been generally excluded from entering the political process in any "reliable and meaningful manner." *Id.* at 767.

Similarly, in *Whitcomb* v. *Chavis*, the Supreme Court discussed slating in the context of the plaintiffs' ability to "participate in the political processes and to elect legislators of their choice." 403 U.S. 124, 149 (1971). In *Whitcomb* the court found that the plaintiffs, inhabitants of the ghetto, had not been excluded from the political process because they had had the opportunity to run for office on the Democratic ticket. The court found no evidence to support a conclusion that the plaintiffs "were regularly excluded from the slates of *both* major parties, thus denying them the chance of occupying legislative seats." *Id.* at 150 (emphasis added) (footnote omitted).

Under *White* and *Whitcomb*, slating is offensive when it has the effect of excluding a minority from reliable and meaningful participation in the political process. The facts of this case do not support the conclusion that this type of slating has been employed in Norfolk City Council elections to the detriment of Norfolk blacks. The only two alleged incidents of slating did not even occur in consecutive elections. Plaintiffs have failed to bear their burden of establishing by the greater weight of the evidence that the alleged westside businessmen's group refused to in-

clude candidates on their ticket based on the candidates' race, or that they so dominate the political scene as to deny blacks access to the electoral process. And, significantly, there is no evidence before this Court which would support the conclusion that a westside businessmen's group controlled Norfolk City Council elections, or even had an inordinate amount of influence over who became members of City Council. On the contrary, the evidence, discussed above, supports a conclusion that election to Norfolk City Council is not dependent on or hindered by any alleged slating process.

Accordingly, this Court finds that plaintiffs have failed to prove the existence of a candidate slating organization which denies blacks access to that process.

9. Responsiveness to the Minority Community's Needs: The East Ghent Redevelopment

In its original opinion, this Court found no lack of responsiveness of Norfolk's officials to the needs of the black community, finding that Norfolk's black community is "well-represented on the more important boards and commissions" and that there is no evidence that minorities are under-represented in City employment. 605 F. Supp. at 394-95. This Court also found that the Libraries, Fire, Human Resources, Police, Health, Parks and Recreation, Public Works, Public Utilities, Community Improvement, Housing Services, Cemeteries and Public School Departments are all responsive to the needs of black citizens. *Id.* at 395-97. These findings were not disturbed on appeal.

This Court also found that, contrary to plaintiffs' allegations, the Norfolk Redevelopment and Housing Authority ("NRHA") had been responsive by replacing slum housing on a one-for-one basis with "decent, safe and sanitary housing." *Id.* at 397. This Court further found that NRHA had not violated federal law with regard to racial balance in public housing, that HUD regulations prevent the use of quotas to achieve racial balance, and that Nor-

folk is a well-integrated city. *Id.* at 398-99. On remand, the Fourth Circuit did not challenge this Court's findings on these housing issues. 816 F.2d at 939.

The only factual finding on responsiveness on which the Fourth Circuit requested clarification was the question of the relocation of black residents from the East Ghent slums. *Id.* This Court originally found that the decisions of the NRHA to relocate black families from East Ghent and to redevelop East Ghent to attract middle-income families were not racially motivated. 605 F. Supp. at 398. On remand from the Supreme Court, the Fourth Circuit held that this Court, instead, should determine whether these decisions were unresponsive to the needs of black families relocated from East Ghent, without regard to motive. 816 F.2d at 939. This Court now finds that these NRHA decisions not only lacked racial animus, but also were not unresponsive to the needs of the East Ghent black families.

All parties agree that prior to redevelopment, the East Ghent neighborhood, which was largely, if not entirely, occupied by blacks, was severely run down. NRHA director David Rice described the area as being:

> . . . in very bad condition. Drainage was very bad. If an area was low, it flooded. The sewer system was worn out and improperly built in the first place, and I would say the housing conditions were almost as bad as some of the earlier conditions in Norfolk after World War II.

Tr. 1751. Rice went on to characterize the area as a "slum". *Id.* NRHA concluded that the housing conditions were so bad that redevelopment required that they demolish the existing housing rather than rehabilitate it. Tr. 1752. Accordingly, the approximately 1,800 families who had been occupying the East Ghent slum housing, the great majority of whom were black, were relocated to other public housing projects and private housing in Norfolk. Tr. 1739, 1741, 1757, 1790, 1818. In moving these families,

NRHA complied with its procedures that families displaced by NRHA programs be moved to "decent, safe and sanitary housing." Tr. 1739-41. NRHA also complied with the requirements of the U. S. Department of Housing and Urban Development (HUD) that withdrawn low-income and moderate-income housing be replaced on a one-to-one basis with other low-income and moderate-income housing, Tr. 1741-42, 1754-55, and that persons displaced by HUD-funded projects be adequately relocated. Tr. [Riddick] 2921-22.

Plaintiffs contend, however, that NRHA was unresponsive to the needs of the East Ghent black families in failing to provide new low-income housing in East Ghent. There were indications at the beginning of redevelopment that such housing would be built in order to allow displaced families to move back to East Ghent. Tr. 1757-58. In fact, the first project built in the East Ghent redevelopment was 150 units of subsidized housing for the elderly. Tr. 1754. However, in 1974, a presidential moratorium on federal subsidies for private housing eliminated most of the HUD funds for the East Ghent redevelopment. Tr. 1753-54, 1762. At about that same time, NRHA decided to redevelop East Ghent so as to attract middle-income families back into downtown Norfolk. Tr. 1754. On the one hand, NRHA's decision was motivated by the need to broaden Norfolk's tax base. Tr. [Riddick] 2915, 2921. HUD concurred with Norfolk's assessment that its tax base needed to be strengthened. Tr. [Riddick] 2915. On the other hand, NRHA wanted to aid in rejuvenating Norfolk's downtown. Tr. 1763. Attracting middle-income families back into downtown Norfolk was consistent with good city planning and was considered by Rice to be a very important part of accomplishing the rejuvenation. Tr. 1763-64. Certainly, the East Ghent black families, as well as other Norfolk residents, were well served by a NRHA policy aimed at ensuring that public services were adequately provided, encouraging a higher quality of life, re-integrat-

ing the inner city area and providing more job opportunities. *See* Tr. [Riddick] 2915. East Ghent's zoning was changed to accommodate NRHA's redevelopment goals, but this zoning change did not prohibit later development of subsidized housing in East Ghent. Tr. 1755-56. Furthermore, the East Ghent development was open to all races. Tr. 1764-65 (Testimony of David H. Rice).

In light of these circumstances, the Court must conclude that the relocation of the East Ghent black families to other housing, and the subsequent redevelopment of East Ghent to attract middle-income families, was not unresponsive to the needs of the East Ghent black families.

III. Conclusion

Plaintiffs' burden in establishing a Section 2 claim is to demonstrate that under the " 'totality of circumstances' . . . the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have *less opportunity than other members of the electorate to participate* in the political process, *and to elect representatives of their* choice." 106 S. Ct. at 2763 (quoting S. Rep.) (emphasis added).

This determination must be based on "a searching, practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process." *Id.* at 2764 (citations omitted). This reality is peculiarly dependent upon the facts of each case.

Having made such a searching, practical evaluation and considering the totality of the circumstances, this Court finds no Section 2 violation. The reality of Norfolk's electoral process is radically different from the reality of the North Carolina districts found to violate Section 2 in *Gingles*. Norfolk's strong black political organizations, consistent white cross-over voting, large candidate fields and the many other factors discussed above combine to give

black citizens a strong voice in Norfolk's City government. While the plaintiffs personally have been unsuccessful when they have run for City office, this Court finds that this lack of success is due to their individual inability to attract a significant following among voters of either race, or to gain the support of Norfolk's black political leaders in their efforts. Their lack of success is not the result of vote dilution cognizable under Section 2 as interpreted in *Gingles*. This Court finds that Norfolk's black voters are usually successful in electing their preferred candidates; that there is no legally significant racial bloc voting in Norfolk, and that the success of black-preferred candidates in Norfolk is so nearly proportional to the black population as to preclude the change sought under Section 2 even if there were legally significant racial bloc voting.

This Court therefore finds that Norfolk's at-large system for the election of City Council members does not violate Section 2 of the Voting Rights Act, and judgment shall enter for the defendants.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

Norfolk, Virginia
February 3, 1988

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1819

Herbert M. Collins; Dr. H. Marks S. Richard; Barbara C. Parham; William E. Swindell, Jr.; Dr. Milton A. Reid; Norfolk Branch, National Association for the Advancement of Colored People; George Banks; and Julian Hazel,

Appellants,

versus

City of Norfolk, Virginia, a municipal corporation; Vincent J. Thomas, Mayor; Dr. Mason C. Andrews; Joseph A. Leafe; Rev. Joseph N. Green, Jr.; Claude J. Staylor, Jr.; Robert E. Summers; and Mrs. Elizabeth M. Howell, members of the Norfolk City Council; City of Norfolk Electoral Board; Paul D. Fraim, Martha H. Boone, and Paul M. Lipkin, members of the City of Norfolk Electoral Board,

Appellees.

On Remand from the Supreme Court of the United States.
85-1300.

Argued: December 9, 1986 Decided: April 9, 1987

Before ERVIN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Frank R. Parker (William L. Robinson; Samuel Issacharoff, Lawyers' Committee for Civil Rights Under Law; James F. Gay on brief) for appellants; R. Harvey Chappell, Jr. (Paul W. Jacobs, II; Christian, Barton, Epps, Brent & Chappell on brief) for appellees.

ERVIN, Circuit Judge:

This case is on remand from the United States Supreme Court. *See Collins v. City of Norfolk*, 54 U.S.L.W. 3866 (U.S. July 7, 1986) (vacating *Collins v. City of Norfolk*, 768 F.2d 572 (4th Cir. 1985)). The Court remanded the case for consideration in light of *Thornburg v. Gingles*, 54 U.S.L.W. 4877 (U.S. June 30, 1986) ("*Gingles*").[1]

The facts were developed succinctly in this court's first opinion, *see* 768 F.2d at 573-75, and fully in the trial court's opinion, *see Collins v. City of Norfolk*, 605 F. Supp. 377 (E.D. Va. 1984). The case involves a challenge to the City of Norfolk's at-large system of voting for city council members. The plaintiffs allege that this system violates the requirements of § 2 of the Voting Rights Act, 42 U.S.C. § 1973.[2] The Senate Judiciary Committee Majority Report

---

[1] The *Gingles* decision affirmed in part and reversed in part a decision of a three-judge panel, *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), which had held that a redistricting plan of the North Carolina General Assembly diluted black citizens' votes in a number of challenged districts.

[2] Those requirements, as amended in 1982, read as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this

accompanying the bill that amended § 2 in 1982 noted seven "typical factors" that were probative of a § 2 violation. These factors were originally derived from *White v. Regester*, 412 U.S. 755 (1973), and they form the framework for § 2 analysis under the amended statute. Interpretation of these factors and their application to the facts at hand are the central problems in this case:

> 1. The extent of any *history of official discrimination* in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is *racially polarized*;
>
> 3. the extent to which the state or political subdivision has used *unusually large election districts, majority vote requirements, anti-single-shot provisions*, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

---

section.

(b) A violation of subsection (a) is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are *not equally open to participation* by members of a class of citizens protected by subsection (a) of this section in that its members have *less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973, as amended, 96 Stat. 134 (emphasis added).

> 4. if there is a *candidate slating process*, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as *education, employment and health, which hinder their ability to participate effectively in the political process*;
>
> 6. whether political campaigns have been characterized by *overt or subtle racial appeals*;
>
> 7. the *extent to which members of the minority group have been elected to public office in the jurisdiction.*

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07 (emphasis added). The Report stresses that this list is neither comprehensive nor exclusive and that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 29. The Report "espouses a flexible, fact-intensive test for § 2 violations," *Gingles*, 54 U.S.L.W. at 4881, but it limits the proof of a § 2 violation in three ways.

> First, electoral devices, such as at-large elections, may not be considered *per se* violations of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. . . . Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. . . . Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.

Id. The *Gingles* decision is essentially a gloss on these factors and limiting circumstances.

The essence of a § 2 claim, as characterized in *Gingles*, is that some electoral characteristic interacts with social and historical conditions to create an inequality in minority and majority voters' ability to elect their preferred candidates. 54 U.S.L.W. at 4882. It is essential for plaintiffs to prove that minority and majority voters consistently prefer different candidates, and that the majority, by virtue of its numerical superiority, will usually defeat the choices of the minority. *Id.*

The minority must show three things as a threshold matter:

1. That it is sufficiently large and geographically compact enough to make a majority, if it were voting in a single-member district;

2. that it is politically cohesive; and

3. that the majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as an unopposed minority candidate—*usually* to defeat the minority's preferred candidate. *Id.* at 4882-83.

The implication of this gloss on § 2 is that, of the seven primary factors on the Senate Report list, two are typically the most important: the existence of *racially polarized voting*, which establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates, and the *actual results* of minority-preferred candidates in winning elections.

The opinions in *Gingles*, while not amounting to lucid explication of all features of the amended § 2, make clear that certain legal errors were committed in trying this case below. We summarize those errors here, and remand to the district court for reconsideration in light of *Gingles*.

I. RACIALLY POLARIZED VOTING

The legal standard for the existence of racially polarized voting looks only to the difference between how majority votes and minority votes were cast; it does not ask why those votes were cast the way they were nor whether there were other factors present in contested elections, such as "white backlash." The court should inquire separately into minority and majority voting, to see whether members of the minority usually vote for the same candidates—if so, there is the requisite minority political cohesiveness—and to see whether the majority vote is sufficiently homogenous to cancel the minority vote plus the cross-over vote. These inquiries together determine whether there is a "pattern of racial bloc voting that extends over a period of time," a critical factor in a claim of vote dilution under § 2.

The district court in this case used an erroneous definition of racially polarized voting. The plaintiffs' definition, offered to the court, was that "racially polarized voting occurs when the majority of one racial group votes contrary to the majority of another racial group." The court rejected this in favor of the defendants' definition, which contained three elements:

> First, the presence or absence of "white backlash," that is, whether white voters turn out in greater numbers than usual in response to the potential election of black candidates. Second, the voting patterns of black and white voters over a period of years. Finally, whether whites attempt to limit the field of candidates.

605 F. Supp. at 386. This choice was wrong, as *Gingles* makes clear. The trial court should not inquire into the first and third elements in determining the existence of polarized voting.

There is no consensus in *Gingles* on the proper role of causation evidence concerning voting patterns, except that

such evidence cannot be used to rebut the claim that there is racially polarized voting.[3] The district court's definitional use of the concept of "white backlash" and the lack of white attempts to limit the field of candidates cannot be defended on the basis of any of the *Gingles* opinions. On remand, the court should pursue the question solely through the analysis of voting patterns, without seeking to explain why those patterns exist.

The district court in this case also rejected plaintiffs' studies of voting patterns due to methodological problems. The problems included, but apparently were not limited to, the lack of data from the mostly white Norfolk naval station residents. *See* 605 F. Supp. at 387. It is unclear from the opinion whether these methodological problems, leading to rejection of the plaintiffs' polarization studies, also included the failure to isolate variables other than

---

[3] Section III(c) of Justice Brennan's opinion for the Court is a plurality section, joined by three other Justices. It says that evidence of other causes for minority bloc voting, such as economic status, party affiliation, incumbency, and the race of the candidate preferred by the minority, is irrelevant to the whole § 2 inquiry. Justice White wrote separately to say that the race of the *candidates* is an important additional factor that could be considered in the inquiry into the existence of racially-polarized voting. One cannot infer from this separate opinion, as plaintiffs suggest, that Justice White agrees that *other* factors, such as socio-economic status, have no place in the entire § 2 case. Justice O'Connor, joined by the Chief Justice and Justices Powell and Rehnquist, concurred separately and said that these other factors should not come in on the question of the existence of racially polarized voting, but should be admitted on the question of whether white bloc voting will consistently defeat minority candidates.

It is difficult to square the plaintiffs' assertion that causative factors are entirely irrelevant with the need to consider special circumstances that might explain particular minority successes, such as white reaction to the filing of a § 2 lawsuit. Those special circumstances are, in essence, other causation factors. For this reason, the separate concurrence of Justice O'Connor is more persuasive in explaining that causation evidence may play a role, albeit not in defining "racially polarized voting."

race in the voting behavior analysis. It is within the trial court's discretion to find that methodological flaws undercut the probative value of a study so deeply as to render it inadmissible. *See, e.g., United States v. 25.406 Acres of Land*, 172 F.2d 990, 993 (4th Cir.), *cert. denied*, 337 U.S. 931 (1949); Fed. R. Evid. 403. But the failure to include causative factors that purport to explain voting patterns cannot be a basis for rejecting plaintiffs' studies on the existence of polarized voting. And given that this case was tried before a judge, the studies should have been admitted unless their methodological flaws were so severe as to render them irrelevant or totally misleading.

The racially polarized voting factor is one of the two cardinal factors identified by *Gingles*. The district court's error in defining it cannot be discounted. It is crucial to the legitimacy of the political system that questions about its fairness be answered unambiguously. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("prejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and may call for a correspondingly more searching judicial inquiry"). Overly restrictive definitions of elements required to be proven by civil rights plaintiffs can act as blinders on justice, and so must be avoided.

II. MINORITY ELECTORAL SUCCESS

The Court in *Gingles* reversed the part of the district panel decision that found a § 2 violation in North Carolina House District 23 (Durham). The fact that blacks in District 23 had enjoyed proportional representation since 1973 mandated judgment for the defendants.[4]

---

[4] Justices Brennan and White thought that the district panel had erred as a matter of law in ignoring this degree of success, 54 U.S.L.W. at 4890, whereas the Chief Justice and Justices Powell, Rehnquist and O'Connor thought that the holding was "clearly erroneous" because

A black citizen has been elected to the Norfolk City Council, comprised of seven members, in every election since at least 1972. 605 F. Supp. at 405. The district court found further that "white candidates who have been the choice of a majority of the black electorate have been elected to the Council consistently over the years." *Id.* at 405. The district court concluded: "blacks and candidates of choice of the black community have been elected to public office in Norfolk." *Id.* at 405.

The district court did not find that the black community in Norfolk had achieved proportional or nearly proportional representation. *Gingles* makes clear only that a minority cannot prove a § 2 violation in the face of continued and proportional success at the polls. The myriad numbers before this panel seem to indicate a consistent level of political success by Norfolk blacks that nevertheless is not as conspicuous as that achieved by the black community in North Carolina District 23.[5] On remand, the district court must determine whether, as a factual matter, black electoral success in Norfolk has been so consistent and nearly proportional as to overshadow any racially polarized voting and other factors tending to dilute minority political access.

The factfinder must use great care in assessing what counts as a "minority electoral success." The mere election

---

insufficient weight was given to the black voters' success, *id.* at 4897. Justice Stevens, joined by Justices Marshall and Blackmun, dissented from the holding concerning District 23, believing that the district court finding of vote dilution was supportable despite the continued election of one out of three representatives by black voters. *Id.* at 4898.

[5] One black (14%) was on the Norfolk City Council from 1968 until 1984, when two blacks (28%) were elected. Blacks constitute somewhere between 30 and 35% of the relevant Norfolk population. The question is not, however, so simple as how many blacks versus whites were elected. The court must examine the parties' studies of voting preferences to determine which were the preferred candidates of the majority and minority communities.

of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice.[6] Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes.

Similar difficulties arise in assessing "special circumstances" that may explain minority electoral success. The three-judge district panel in *Gingles v. Edmisten* found that the pendency of the § 2 lawsuit reduced the weight to be accorded black electoral success in the 1982 election. In contrast, the district court in this case found that the 1984 election of a second black to the Norfolk City Council was not a result of a "conspiracy" to moot this lawsuit. 605 F. Supp. at 393. The Supreme Court in *Gingles* reaffirmed the importance of investigating beyond the surface outcome of an election when evaluating minority success; a trial court must consider, for example, whether that success was prompted by an attempt to forestall Voting Rights Act litigation. *See* 54 U.S.L.W. at 4890; *see also Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973), *aff'd sub nom East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

---

[6] This may have been the case in the 1974 and 1980 elections in Norfolk, when black candidates apparently received votes from more than 80% of black voters, but were not elected, while one or more white candidates received votes from 56 to 74% of black voters, and were elected.

Moreover, the absence of a conspiracy or an intent to moot this litigation does not end the district court's inquiry. The court should probe further to determine whether the black candidate's success in 1984, while this action was pending, resulted from unusual circumstances. Never before in the history of the city had two black councilmen served simultaneously. Nevertheless, the mayor supported a second black candidate for the first time. He coupled his unprecedented support with the public statement, "After the election, the issue of black representation may become a moot point."

The mayor's intent, or whether he and other white leaders conspired, is not dispositive. A proper inquiry must examine the result of the mayor's conduct and statement. If voting patterns show unusual white support for the black candidate in 1984, the legal significance of his success should be diminished. *See* 54 U.S.L.W. 4889-90. As long as that particularized investigation is made, however, the trial court's findings should not be disturbed on appeal unless they are clearly erroneous.

The presence of either of these two cardinal factors—voting that is severely polarized along racial lines or sustained minority electoral success that achieves proportional or nearly-proportional representation—would weigh very heavily in the ultimate determination that minority voters do not or do have equal access in the polity. But that ultimate determination still must be made on the basis of the "totality of the circumstances." Once the ultimate determination is made, the "clearly erroneous" test of Rule 52(a) is the appropriate standard for appellate review. *See* 54 U.S.L.W. at 4890; Fed. R. Civ. P. 52(a). However, the definitions and legal criteria—such as of "racially polarized voting"—must accord with law, and will be reviewed as legal questions.

III. OTHER SENATE REPORT FACTORS

The district court's definition of "a candidate slating process" was overly restrictive, and should be abandoned. The district court found no group of white citizens in Norfolk acting as a formal or informal slating organization which controlled access to the ballot. The district court accepted a definition of "slating group" proposed by one of the defendants' experts that put important emphasis on the fact that such a group proposes candidates for *all* available seats. Thus, two white businessmen who ran together for City Council in 1976 were not viewed as slated candidates, because they had no third running mate for the other vacant seat. *Gingles* did not change or refine the understanding of a "slating group" or "slating process."

There seems to be no consensus in federal law or in political science texts on a definitive meaning of the phrase "slating group." But there is no support in the law for the restrictive definition chosen by the trial court. In *White v. Regester*, 412 U.S. 755, 766-67 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124, 150-51 & n.30 (1971), two important sources for the phrase that ultimately made its way into the Senate Report, the Court viewed "slating" as essentially involving the endorsing of candidates. The Court did not explore whether the slating groups involved in those cases always filled all slots on the ballot. It strains common sense to suppose that an organization could regularly put up candidates for ninety-nine of one hundred slots on a ballot, yet escape being labeled a "slating organization" for purposes of § 2 analysis. On remand, the district court should avoid the use of highly artificial definitions to restrict the Senate Report inquiry. While the fact that the alleged slating group in Norfolk sometimes endorsed candidates without giving endorsements for all available seats might be a *factor* in finding that it was not a slating organization that denied access to minorities, that fact

does not contravene the Senate Report factor as a matter of law.

Unlike the situation in the disputed North Carolina districts at issue in *Gingles*, *see* 54 U.S.L.W. at 4879-80, black voter registration and turnout have recently increased in Norfolk. The district court acknowledged that fact, *see, e.g.*, 605 F. Supp. at 402, 404, as did this court in its first opinion, *see* 768 F.2d at 574-75. This factor is probative, but not dispositive, of black electoral participation, and there is no reason to believe that the district court viewed it as inordinately important.

The district court found no special electoral devices used in Norfolk that "enhanced the opportunity for discrimination against the minority group." 605 F. Supp. at 403. Many particular features of an electoral system, such as the lack of district residency requirements and the presence of staggered terms of office, may under some circumstances make it structurally more difficult for minorities to be elected. *Cf. Gingles*, 54 U.S.L.W. at 4880 ("procedures *may* operate to lessen . . . opportunity") (emphasis added). The question whether those procedures do so operate is a factual one, to be reviewed on the same basis as other factual matters. There is no indication that the district court clearly erred in finding no discriminatory devices in Norfolk.

Finally, the district court considered the plaintiffs' allegations of unresponsiveness to the needs of the minority community and found that the defendants had rebutted most of these allegations. The district court ruled that the plaintiffs had to prove that the removal of 1,800 families, most of whom were black, for redevelopment for housing for middle-income families, was racially motivated. This was the wrong legal test. Proof of discriminatory intent, as *Gingles* noted, is not required by § 2 of the Act, and it is not an element of proof of the factors mentioned in the Senate report. On remand, the district court should

determine whether the removal of these black families by city officials was unresponsive to their needs without requiring proof that the officials were racially motivated.

On remand issues may arise which are not addressed by this opinion. In this event, the district court should follow the mandate of the Supreme Court and consult *Gingles* for guidance.

REVERSED AND REMANDED.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 85-1300

Herbert M. Collins, *et al.*,

Petitioners,

v.

City of Norfolk, *et al.*

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this case is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Thornburg* v. *Gingles*, 478 U.S. ___ (1986).

IT IS FURTHER ORDERED that the petitioners, Herbert M. Collins, et al., recover from City of Norfolk, et al., Two Hundred Dollars ($200.00) for their costs herein expended.

July 7, 1986

Clerk's costs: $200.00

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1819

Herbert M. Collins; Dr. H. Marks S. Richard; Barbara C. Parham; William E. Swindell, Jr.; Dr. Milton A. Reid; Norfolk Branch, National Association for the Advancement of Colored People; George Banks; and Julian Hazel,

Appellants,

versus

City of Norfolk, Virginia, a municipal corporation; Vincent J. Thomas, Mayor; Dr. Mason C. Andrews; Joseph A. Leafe; Rev. Joseph N. Green, Jr.; Claude J. Staylor, Jr.; Robert E. Summers; and Mrs. Elizabeth M. Howell, members of the Norfolk City Council; City of Norfolk Electoral Board; Paul D. Fraim, Martha H. Boone, and Paul M. Lipkin, members of the City of Norfolk Electoral Board,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (C/A 83-526-N).

Argued: April 1, 1985 Decided: July 22, 1985

Before MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Frank R. Parker (William L. Robinson; Patricia M. Hanrahan on brief) for Appellants; R. Harvey Chappell, Jr. (Paul W. Jacobs, II, Christian Barton, Epps, Brent & Chappell; Philip R. Trapani; Harold P. Juren; Lydia C. Taylor; Office of the City Attorney on brief) for Appellees.

MURNAGHAN, Circuit Judge:

Maintenance by the City of Norfolk, Virginia, of an at-large election procedure covering members of the City Council has led to a suit by the National Association for the Advancement of Colored People and seven black Norfolk voters contending that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973[1] had been violated. The suit also claimed infringement of the Fourteenth and Fifteenth Amendments through adoption in 1918 of the at-large election as a means to promote racially discriminatory objectives.

[1] (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) as provided in subsection (b) of this section.

(b) A violation of subsection (a) is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Emphasis added).

The relief sought was replacement with a plan establishing seven single member districts, each with one representative in the City Council, together with a declaration of the illegality of and an injunction prohibiting the at-large system due to an unlawful dilution of black voting strength.

A bench trial lasting ten days and producing over 2100 pages of transcript and more than 590 exhibits resulted in a judgment in favor of the City of Norfolk and its officials joined as defendants. The issues raised, though sporting various guises, were essentially factual and, in the end, amounted to the assertion that the district judge, in his findings, was clearly erroneous. Manifestly, a heavy burden has been assumed on appeal by the parties who were unsuccessful in the district court. *Anderson v. City of Bessemer, North Carolina*, 53 U.S.L.W. 4314 (U.S. March 19, 1985).[2] Accordingly, we must examine the factual record "in light of the appropriately deferential standard" afforded the district court's findings. *Id.* at 4318.

Historically, in 1918, provision was made for a five-member City Council, each to be elected at-large. Each was to have a term of four years, with terms to be staggered, presumably to minimize the possible ill-effects of a 100% turnover, all at the same time. Between 1949 and 1952, the number of councilmen rose to seven. In 1968 a nine-member Advisory Study Commission, one of whose members was black, was created by the City Council to study and evaluate the 1918 Charter. Its report and recommendations appeared in 1971. It unanimously recom-

---

[2] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. . . .

53 U.S.L.W. at 4317.

mended retention of staggered terms and at-large elections, agreeing that "councilmen should be elected by and be responsive to the entire community rather than a portion of it." The Commission also expressed a wish to avoid parochialism, which is another way of saying the same thing.

Since 1968, one member of the City Council has been black, Joseph A. Jordan, Jr. from 1968 to 1977, and Joseph Green from 1977 to the present. Jordan was vice mayor during his terms beginning in 1972 and 1976. Green has been vice mayor since 1982. In 1984, John Foster, another black, was elected to the City Council.[3]

---

[3] A point pressed by the appellants was the asserted existence of a conspiracy to orchestrate Foster's election through the decision, after the institution of this suit, of a white candidate to abandon efforts to obtain reelection. Such interference with the election process would no doubt have been of immense significance to the ultimate outcome of the case, if proven. However, it was obliterated by the district judge's findings, which were not clearly erroneous, that the white candidate's withdrawal was for personal reasons and that his support for election of a second black antedated the filing of the suit. The district judge went on to find that "[t]here is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action."

The dissent contends that it was *clearly erroneous* for the district court to conclude that the city officials did not attempt to moot the instant lawsuit. To support its contention, the dissent highlights a newspaper article in which the Mayor of Norfolk was quoted as saying, "After the election, the issue of black representation may become a moot point." Whether that published statement which, on its face, amounts to no more than the expression of an opinion by no means necessarily inaccurate, constituted a subtle and improper racial appeal pivoted largely on the credibility of the Mayor's defense of that statement as well as a close factual examination of the general political mood in Norfolk at the time of the City Council election. Thus, we in the panel majority are hardpressed to upset the district judge's conclusion that Foster's election was not promoted for an improper purpose. *See Anderson v. City of Bessemer, supra*, at 4317.

Plurality voting governs in Norfolk. Single-shot voting is not prohibited, *i.e.*, casting votes for a full slate is not required.[4] The Norfolk rules impose no numbered place or residency requirements.[5] Since the passage of the Voting Rights Act in 1965, the black voter registration rate and

---

[4] Although staggered terms can have the effect of frustrating single-shot voting, the district court found that the City of Norfolk adduced sufficient evidence at trial to prove that the staggered terms of the City Council members did not promote "head to head contests between [Blacks] and whites and [did not] deprive [Blacks] of the opportunity to elect a candidate by single-shot voting." *City of Rome v. United States*, 446 U.S. 156, 185 (1980). The district court noted that, if staggered terms were to have a discriminatory effect upon Norfolk's City Council elections, it would be likely that the elections for the fewest number of seats would not yield any black candidates. Yet the evidence demonstrated that in those elections in which the fewest number of seats—i.e., three—were open for election, a black had always been victorious. In light of such evidence, the district court's findings with respect to staggered terms cannot be deemed clearly erroneous.

[5] There is disagreement over whether residency requirements minimize the voting strength of racial minorities. *See Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (Without residency requirement all residents could reside in " 'lily-white' neighborhoods"). *Compare Perkins v. City of West Helena*, 675 F.2d 201, 212 (8th Cir. 1982), *aff'd*, 459 U.S. 801 (1982) (Ward residency requirement, *inter alia*, effectively prohibited single-shot voting and "enhance[d] the possibility that [City's] election scheme [was] being maintained for a discriminatory purpose"). The lesson to be derived is that any particular aspect of the voting process need not be absolutely good or bad. Rather the application in the particular case should control, and we should eschew generalities. Determining whether residency requirements, or the lack thereof, hinder the position of racial minorities within the electoral process requires a careful factual and statistical analysis of the specific political community under scrutiny.

In the instant case, the district court, after considering all of the evidence, concluded that the lack of a ward residency requirement did not enhance the opportunity for discrimination in elections for Norfolk City Council members. That conclusion was amply supported by the record. For example, the record demonstrated that the lack of a residency requirement did not water down the ability of black voters successfully to utilize single-shot voting nor did it result in "lily-white" representation.

turnout rate, based on a percentage of the black voting age population, have increased to the point that today they exceed those of Norfolk's white population. White registration is 51.2% of the white voting age population as against 52.9% for the black voting age population. Those figures developed by regression analysis are comparable to 53.1% white and 55.3% black on the homogeneous precinct analysis. Black voter turnout exceeded white voter turnout in the 1984 election. The black turnout rate was 11% higher.[6]

Norfolk's efforts to increase voter registration have been exemplary. In the 1984 election, six staff positions were equally divided, three and three in the main registration office. Of the 371 election officers, 102 were black.

The Concerned Citizens of Norfolk, a black political organization, endorses both black and white candidates and wields considerable clout. From 1972 through 1984, it had endorsed twenty-one candidates for the City Council. Thirteen (62%) have been elected, of whom five were black and eight white.

The municipal work force was 36.16% black in 1973, 41.31% black in 1983. Representation on major boards and commissions appointed by the City Council has been reasonably good. The parties stipulated that programs and services of the fire department, the library department and the Department of Human Resources did not discriminate against blacks and have been responsive to their needs.

There are other statistics which generally show improvement in the status and circumstances of blacks in Norfolk. The median income disparity ($17,548 for whites, $10,250

---

[6] Those statistics came from studies introduced in evidence by the appellants. They did not cover the predominantly white residents of naval bases and ships. Had they been included, the statistics would have been even more striking as to black predominance.

for blacks), an endemic problem for the entire United States, has not been demonstrated to be related in any way to the procedures for election to the Norfolk City Council.

In amending in 1982 the Voting Rights Act, Congress called for consideration, in probing the totality of the circumstances, of the following factors:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in 1982* U.S. Code Cong. & Ad. News 177, 206-207. Those factors, while generally the most probative, are not exclusive. Congress, through the Senate Committee on the Judiciary, has made clear that at-large elections need not be eliminated. *Id.* p. 211. The test established by the 1982 amendments merely codified pre-existing law. *See, e.g., White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

Looking at the facts, as established by the record as a whole, and measuring the question presented by "the totality of the circumstances," we simply are not left with a firm conviction that an error has been committed by the district judge. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Perhaps, in such detailed and lengthy findings as the district judge made here it is inevitable that a phrase sprinkled here or there might occasion regret,[7] but the question is not whether we could

---

[7] For example, the dissent contends that the district court, evidenced by his remarks throughout trial, "equated 'proportional political representation' with the institution of a ward system in which some wards will have a majority of black voters." However, the district judge's remarks must be read in the context of a rather long and difficult trial in which he was attempting to comply with the proviso in § 2 of the Voting Rights Act ("*Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal

have done better—a matter of necessarily of some uncertainty—but whether the district judge to whom the resolution of factual disputes is finally allocated was clearly erroneous. We cannot say that he was. Accordingly, we affirm.

AFFIRMED.

---

to their proportion in the population."). Thus, the district court, in contrast to the dissent's assertion, did not conclude, as a matter of law, that ward systems would be violations of that proviso but rather merely attempted to grapple with the interplay between the appellants' desired relief and a statutory prohibition.

BUTZNER, Senior Circuit Judge, dissenting:

The principal issues the appellants raise address errors of law to which the clearly erroneous rule does not apply. Pullman Standard v. Swint, 456 U.S. 273, 287 (1982). Because these assignments of error are meritorious, I would vacate the judgment of the district court and remand the case for consideration of the evidence in accordance with correct legal standards.

The appellants complain that the district judge denied them a fair trial because of his expressed antipathy to the conversion of an at-large electoral system to a ward system in which some wards would have a predominately black population. In support of their complaint, the appellants emphasize the following comments of the district court during the proceedings:

> Well, aren't you when you're asking for a ward system which will guarantee more blacks on [council], that is a quota system, isn't it?
>
> * * *
>
> That's the problem I have philosophically and I may be premature in raising it.
>
> * * *
>
> Well, the real question is whether segregated voting ought to be the rule of the day or integrated voting.
>
> * * *
>
> If you had a 100 percent black ward, there won't be any white candidates there for blacks to vote for, would there?
>
> See, what concerns me is you are espousing segregated voting, and that really concerns me as a matter of principle.

> We're trying to integrate housing, we're trying to integrate schools, we're trying to integrate jobs, we're trying to integrate society so it will work together, and your position is, as a very basic thing, which goes to how we live and how we get along together, and that is the right of franchise, you want to segregate. And that does concern me.
>
> * * *
>
> So your design, I take it, then is to see that the blacks get a certain quota of people on city council?
>
> * * *
>
> When you segregate them aren't you creating more problems than you're doing good?
>
> * * *
>
> They have voted for successful candidates, both black and white, and isn't that better in an integrated society than putting somebody in a color stockade and say this is the way you're going to do?
>
> * * *
>
> How is the establishment of a ward system going to correct [racial appeals]? How are you going to bring about a millenium of peace on earth and good will toward men by segregating the white vote and the black vote by establishing a ward system?

The court's characterization of the relief the appellants are seeking pervaded its perception of the entire proceedings. Thus, in the introduction to its opinion, the court wrote in discussing the "Applicable Law":

> Two competing legal principles are applicable in this case. The first is that political systems or

> practices which deny minority voters access to the political system have been repeatedly struck down by the courts. . . . The second is that courts have consistently rejected the view that any group has a constitutional right to proportional political representation. . . . These competing legal principles are directly involved in this case. (citations omitted)

The appellees respond that the district court was not biased and it did not deny the appellants a fair trial. On the contrary, they say, the concerns raised by the court

> were solely in the context of (1) whether a ward system in Norfolk would, in order to establish appellants' goals, require a quota system contrary to the express provisions of the Voting Rights Act and (2) whether wards in Norfolk would, as a practical matter, end cross-over racial voting patterns and coalition politics which presumably otherwise are to be encouraged.

I do not subscribe to the appellants' complaint of bias. The court's error was not due to prejudice. The error was the court's incorrect interpretation of the proviso found in section 2 of the Voting Rights Act, which states: "Provided, that nothing in this section establishes a right to have members of a protected class election in numbers equal to their proportion in the population." 42 U.S.C. § 1973. Both the appellees and the district court incorrectly have equated "proportional political representation" with the institution of a ward system in which some wards will have a majority of black voters.

Given the court's misperception of the proviso, judgment against the appellants was foreordained. It is wrong to remedy an illegal at-large system by substituting a proportional representation system; but it is not wrong to substitute a fairly drawn ward system even though some wards will have a majority of black voters. On more than

one occasion the Supreme Court has approved conversion of discriminatory at-large system to a ward system. The ward system must be fairly drawn, but if this condition is met, it is no impediment that some wards have predominately black residents and others have predominately white residents. For example, in City of Richmond v. United States, 422 U.S. 358, 372 (1975), the Court approved the replacement of an at-large electoral system for the city council with a ward system of four wards with a 64% black majority, four wards with a heavily white electorate, and one ward with a 40.9% black population. More recently, approving the conversion of an at-large system to a ward system in Rogers v. Lodge, 458 U.S. 613, 616, (1982), the Court observed that a minority may be unable to elect representatives in an at-large system, but it may be able to elect several representatives if single-member districts are established.

The appellants do not seek proportional representation. Instead, they seek conversion of an at-large system to a ward system. Nevertheless, in its discussion of "Applicable Law," the court confused an impermissible "proportional political representation plan" with a permissible ward plan. The court's perception that the relief the appellants sought competed with the rights secured by section 2 of the Voting Rights Act was a mistake of law that infected this entire proceeding. Indeed, the concerns the district court expressed during the trial about the remedy the appellants seek were similar to the views rejected by the Congress when it enacted the 1982 amendments to the Voting Rights Act. *See* Gingles v. Edmiston, 590 F. Supp. 345, 356-57 (E.D.N.C. 1984) (three-judge court), *prob. juris. noted*, Thornburg v. Gingles, 105 S. Ct. 2137 (1985).

Although the appellants contend that some of the district court's findings are clearly erroneous when tested by the precepts of United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), the primary thesis of their appeal is the commission of errors of law. They assert that

the district court erred in applying the criteria prescribed by S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-207 (hereinafter cited as Senate Report). These criteria were derived from case law and should be interpreted in the light of that law.

One of the most important factors Congress directed courts to consider is the extent to which voting is racially polarized. The district court adopted a definition of polarization that required the appellants to prove "white backlash" and that "whites attempt to limit the field of candidates." In support of this definition, it cited a single case, United States v. Dallas County Commission, 548 F. Supp. 875, 904-05 (S.D. Ala. 1982). This case, however, has been reversed by a decision that recognized the existence of racial polarization without requiring proof of either additional element. *See* United States v. Dallas County Commission, 739 F.2d 1529, 1535-36 (11th Cir. 1984).

The definition of polarization the district court applied is contrary to precedent. The Supreme Court has recognized that racially polarized voting exists when there is "bloc voting along racial lines." Rogers v. Lodge, 458 U.S. 613, 623 (1982). *See* United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977) (voting following racial lines). *See also* NAACP v. Gadsen County School Board, 691 F.2d 978, 982 (11th Cir. 1982); City of Rome v. United States, 472 F. Supp. 221, 226 (D.D.C. 1979) (three-judge court), *aff'd*, 446 U.S. 156 (1980).

The additional elements the district court engrafted on the accepted definition of racially polarized voting require proof of intention to abridge the minority's voting rights. This is evident from the Court's insistence that minority complainants prove that "whites attempt to limit the field of candidates." But in enacting the 1982 amendments to the Voting Rights Act, Congress eliminated the necessity

of proving a discriminatory purpose to establish a violation of the Act. *See Senate Report* at 27, 1982 U.S. Code Cong. & Ad. News 205. The district court's interpretatior is contrary to the cardinal principle of the 1982 amendment.

Another factor deemed important by the Senate Judiciary Committee is a slating process to which the minority has been denied access. To determine whether this factor exists, the district court adpoted, without the citation of precedent, a restrictive definition of a "slate." The court required the appellants to prove a "permanent or semi-permanent organization" which solicits candidates to run for office and puts them up "for as many seats as are open." The legislative history offers no support for this definition. It is contrary to the accepted meaning of "slate," which Webster's *Third International Dictionary* defines as simply "the group of persons proposed for appointment, nomination, or election." Significantly, courts that have discussed slates or a slating process have not imposed the burdensome requirements initiated by the district court. *See* White v. Regester, 412 U.S. 755, 766-67 (1973); McIntosh County NAACP v. Darien, 605 F.2d 753, 758 (5th Cir. 1979).

The responsiveness of elected officials to the particularized needs of the members of the minority group is another factor mentioned in the Senate Report. In its inquiry about this subject, the district court required the appellants to prove that the relocation of approximately 1800 black families whose neighborhood was redeveloped for middle-income families was racially motivated. This was an error of law. It bears repeating that minority citizens are not required to prove a discriminatory purpose to establish their rights under section 2 of the Voting Rights Act. Faulty interpretation of the Act is not avoided by requiring proof of "racial motivation," for this term is simply a semantic disguise for "discriminatory purpose."

Contrary to Supreme Court precedent, the district court held that staggered terms and the lack of residency requirements do not enhance the opportunity for discrimination against minorities. *See* City of Rome v. United States, 446 U.S. 156, 185 (1980) (staggered terms); Rogers v. Lodge, 458 U.S. 613, 627 (1982) (lack of residency requirements). *See also* Jones v. Lubbock, 727 F.2d 364, 383 (1984) (staggered terms are evidence of violation of Section 2 of the Voting Rights Act). Additionally, staggered terms of office are cited as examples of objective factors of discrimination in both House and Senate reports. H.R. Rep. No. 227, 97th Cong., 1st Sess. 18 (1981); *Senate Report* at 143-44, 1982 U.S. Code Cong. & Ad. News 315-16.

It is not the function of this dissent to reassess the evidence in light of the correct principles of law. This can be undertaken by the district court on remand. It is enough to note that the district court's judgment is fatally flawed by its erroneous interpretation of statutory and case law and that application of proper legal standards to the evidence could alter the outcome of this litigation.

Nevertheless, a fact the district court omitted in its opinion deserves comment. The keystone of the appellees' defense was the election of a second black councilman in 1984 after this action was commenced. The appellants challenge the significance of this event. They point out that despite a long history of discrimination by city officials, the mayor for the first time supported a second black candidate for council. The appellants emphasize that the mayor publicly stated how the election of the candidate would affect this litigation in which the mayor was a defendant.

Testifying under cross-examination, the mayor admitted that he was quoted correctly in a newspaper article before the election:

> [Plaintiffs' attorney]: Now, the next to the last paragraph of that article, "The election of a second black Council member could influence the outcome of an NAACP suit seeking a ward system in Norfolk. The suit contends current at-large elections have prevented blacks from getting fair representation on Council and seeks to establish a ward system. The case is scheduled to be [heard] May 17 in the U.S. District Court.
>
> And then you're quoted here, Mayor, " 'After the election, the issue of black representation may become a moot point,' Thomas said."
>
> Do you agree with that?
>
> [Mayor]: Yeah, I said that. That's merely an observation. That has nothing to do with my motivation for supporting a black for City Council.

Regardless of his intentions about supporting a black candidate for an unprecedented second seat, the mayor seized on the opportunity of that candidacy to let his constituents know that a favorable vote for the black candidate could moot the issue of black representation, a development, of course, which he favored.

The mayor's published statement was a subtle racial appeal, of the type which the Senate report condemns, for implicitly it appealed to all who opposed the ward system, which was sought by the NAACP, to vote for the mayor's black candidate. The district court did not discuss this episode. Instead, it brushed aside the challenge to the appellees' defense as "innuendo." Without mention of the mayor's public statement about mooting the issue of black representation, the district court found: "There is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action."

Whatever the mayor did or did not do to "orchestrate" the black candidacy for a second seat, he certainly promoted it for an improper purpose. The mayor's tactic is not new. It has long been suspect. In a case from which the Senate Judiciary Committee derived the factors it prescribed, Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973), *aff'd sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), the court said:

> [W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. . . . [S]uch success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds.

Because the evidence discloses that the mayor publicly represented that election of the black candidate, whom he supported, might moot the issue that is at the heart of this action, I cannot accept the notion that the district court's finding was not clearly erroneous.

I respectfully dissent.

APPENDIX F

JUDGMENT ON DECISION BY THE COURT FOR THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA/NORFOLK DIVISION

CIVIL ACTION DOCKET NO. 83-526-N

HERBERT M. COLLINS, *ET AL*

vs.

CITY OF NORFOLK, VIRGINIA, *ET AL*

JUDGMENT

This action came on for trial before the court, United States District Judge J. Calvitt Clarke, Jr., presiding. The issues having been duly tried and a decision having been duly rendered, **it is ordered and adjudged** that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants recover of the plaintiffs his costs of action.

Dated at: Norfolk, Virginia

Date: July 19, 1984

W. FARLEY POWERS, JR.,
Clerk of Court

By /s/ Bonnie L. Day
Deputy Clerk of the Court

A TRUE COPY, TESTE:
W. Farley Powers, Jr., Clerk

By /s/ Bonnie L. Day
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 83-526-N

HERBERT M. COLLINS, DR. H. MARKS S. RICHARD, BARBARA C. PARHAM, WILLIAM E. SWINDELL, JR., DR. MILTON A. REID, NORFOLK BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, GEORGE BANKS, and JULIAN HAZEL,

Plaintiffs,

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; VINCENT J. THOMAS, Mayor, DR. MASON C. ANDREWS, JOSEPH A. LEAFE, REV. JOSEPH N. GREEN, JR., CLAUDE J. STAYLOR, JR., ROBERT E. SUMMERS, and MRS. ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM, MARTHA H. BOONE, and PAUL M. LIPKIN, members of the CITY OF NORFOLK ELECTORAL BOARD,

Defendants.

MEMORANDUM OPINION

This matter is before the Court following a nonjury trial which was held on May 21 to June 5, 1984. After hearing the evidence, the Court directed the parties to submit post-trial briefs addressing the factual and legal issues raised. Post-trial briefs have been received, and therefore the matter is now ripe for decision.

The plaintiffs in this action are seven black residents and registered voters of the City of Norfolk, Virginia and the Norfolk Branch of the National Association for the Advancement of Colored People (NAACP). The defendants

are the City of Norfolk, the seven members of the Norfolk City Council who were serving when this action was filed, the Norfolk Electoral Board and the three members of the Electoral Board.

The plaintiffs allege that the at-large system of electing members of the Norfolk City Council unlawfully dilutes black voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973. Alternatively, they allege that the at-large system was adopted in 1918 and has been maintained for a racially discriminatory purpose in violation of their Fourteenth and Fifteenth Amendment rights and 42 U.S.C. § 1983.

The plaintiffs seek (1) a declaratory judgment that the at-large system of electing members of the Norfolk City Council unlawfully dilutes black voting strength; (2) an injunction prohibiting the holding of future City Council elections under the at-large system; and (3) the replacement of the at-large system with a plan whereby all seven City Council members would be elected from wards or single-member districts. A motion to certify this action as a class action was denied by Order of February 23, 1984.

I. APPLICABLE LAW

Two competing legal principles are applicable in this case. The first is that political systems or practices which deny minority voters access to the political system have been repeatedly struck down by the courts. *See, e.g., White* v. *Regester*, 412 U.S. 755, 765-70 (1973); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1304-07 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (per curiam). The second is that courts have consistently rejected the view that any group has a constitutional right to proportional political representation. *See, e.g., Whitcomb* v. *Chavis*, 403 U.S. 124, 156-57 (1971). These competing legal principles are directly involved in this case.

Section 2 of the Voting Rights Act, as amended in 1982, reads as follows:

> SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a matter *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its *members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: PROVIDED, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (Supp. 1984) (emphasis added).

Congress amended Section 2 of the Voting Rights Act to prohibit electoral practices and procedures that create discriminatory results, even though the responsible governmental body had not installed or maintained the elec-

toral practice or procedure in order to discriminate.[1] In amending the Act, Congress in effect overruled *City of Mobile* v. *Bolden*, 446 U.S. 55, 66-71 (1980), in which the Supreme Court held that a claim of denial of access to the political process by a minority group requires a showing of purpose to discriminate. Specifically, the *Bolden* Court held that both in an action based upon the Fourteenth and Fifteenth Amendments and in an action based upon Section 2 of the Voting Rights Act, as originally enacted, the plaintiffs were required to show an intent to discriminate. *Id.* at 62-65.

In amending Section 2, Congress sought to remove the requirement that proof of discriminatory intent was necessary to establish a violation of Section 2. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 179; *see Jordan* v. *City of Greenwood*, 711 F.2d 667, 668-69 (5th Cir. 1983). Congress endeavored to codify the holding in pre-*Bolden* cases, specifically the holding in *White* v. *Regester*, 412 U.S. 755 (1973). In *White*, the Supreme Court held that to sustain a claim of vote dilution the plaintiffs' burden is:

> to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 766.

To establish a violation of Section 2, plaintiffs may show a variety of factors in an attempt to prove their case. The

---

[1] The defendants do not challenge the constitutionality of amended Section 2, which has been held to be constitutional by a number of courts. *See, e.g., Jones* v. *City of Lubbock*, 727 F.2d 364, 372-75 (5th Cir. 1984); *Major* v. *Treen*, 574 F. Supp. 325, 342-49 (E.D. La. 1983).

Senate Committee on the Judiciary included a list of typical factors in its report:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; and
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07.

Two additional factors listed in the Senate Report as having probative value are:

> 1. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
>
> 2. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id.

The factors listed in the Senate Report are similar to the factors articulated originally in *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1975) (per curiam). In *Zimmer*, the Fifth Circuit listed four "primary" or "principal" factors which should be considered in a vote dilution case. These factors are:

> 1. a lack of access to the process of slating candidates;
>
> 2. the unresponsiveness of legislators to the minority's particularized interests;
>
> 3. a tenuous state policy underlying the preference for multi-member or at-large districting; and
>
> 4. the existence of past discrimination which in general precludes effective minority participation in the election system.

Id. at 1305. The *Zimmer* court also listed four so-called enhancing factors, which tend to support the findings made relative to the four primary factors. These are:

> 1. the existence of large districts,
>
> 2. the existence of majority vote requirements;
>
> 3. the existence of anti-single shot voting provisions; and

> 4. the lack of provision for at-large candidates running from particular geographical subdistricts.

Id.

Both the *Zimmer* case and the Senate Report explicitly state that there is no requirement that the plaintiffs prove that all or even a majority of these factors are present. *Zimmer*, 485 F.2d at 1305; S. Rep. No. 417, 97th Cong., 2d Sess. 29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207. Rather, courts are to consider the existence, or lack of existence, of these factors in the *Zimmer* court's terms in the "aggregate," or as the language of Section 2 states, based upon the "totality of circumstances." It should be pointed out that the Senate Committee specifically stated that it did not intend that the factors be used "as a mechanical 'point counting' device." S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.118, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207.

This Court, therefore, will examine seriatim the factors listed in *Zimmer* and in the Senate Report. The Court will make detailed findings of fact with reference to each factor which the plaintiffs allege is applicable, as required by Rule 52(a) of the Federal Rules of Civil Procedure. The Court is aware of the requirement that it discuss all substantial evidence contrary to its opinion. *See Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1020-21 (5th Cir. 1984). The Court will then weigh the factors and determine whether, "based on the totality of circumstances," the plaintiffs have shown that the political processes leading to the election of the members of the Norfolk City Council "are not equally open to participation" by the black citizens of Norfolk, in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973 (Supp. 1984).

Should the Court determine that the plaintiffs have failed to prove a violation of Section 2 of the Voting Rights Act,

the Court will then consider whether the plaintiffs have proven that their Fourteenth and Fifteenth Amendment rights have been violated. *Bolden* remains the law with regard to constitutional violations. *See Chapman* v. *Nicholson*, 579 F. Supp. 1504, 1507 (N.D. Ala. 1984). The Court will determine whether the plaintiffs have shown that the at-large system was adopted and has been maintained with the intent of discriminating against the black citizens of Norfolk.

II. FINDINGS OF FACT

A. Introduction

According to the 1980 Census, Norfolk has a total population of 266,979 persons, of whom 60.8%, or 162,300, are white, and 35.2%, or 93,987, are black. The 1980 figures show that Norfolk has a total voting age population of 201,366, of whom 64.85%, or 130,595, are white and 31.48%, or 63,396, are black. Norfolk does not maintain voter registration figures by race.

The City of Norfolk currently is governed by a City Council consisting of seven members who are elected by the voters of the City in at-large elections. The seven members of the Council elect the mayor from amongst themselves. Members serve four-year terms, which are staggered. Three seats were at stake in the most recent election, which was held on May 1, 1984. The next election is scheduled for May, 1986, at which time the four remaining seats will be up for election. Elections are held every two years and always occur in even-numbered years.

At-large City Council elections have been held in Norfolk continuously since 1918, when a new City Charter was adopted. The Charter changed the form of City government to a city manager - council form of government.

Since at-large elections were instituted in 1918, three blacks have been elected to the Norfolk City Council. Joseph A. Jordan, Jr. was first elected to the City Council

in 1968, and was reelected in 1972 and 1976. He served as vice mayor during his last two terms. When Jordan resigned from his seat on Council as a result of having been appointed a judge, Reverend Joseph N. Green, Jr. was appointed to fill Jordan's unexpired term. Rev. Green was elected to the City Council in 1978 and again in 1982. He has served as vice mayor since 1982 and was recently reelected to that office. The third black, Reverend John Foster, won a seat on the City Council in the May 1, 1984 election. Accordingly, for the period of July 1, 1984 through June 30, 1986, the seven-member Council will have two black members, Rev. Green and Rev. Foster.

B. History of the Adoption of the At-Large System

The plaintiffs' historian, Dr. Peyton McCrary, and the defendants' historian, Dr. Peter Stewart, each presented their view of the history which preceded the adoption of at-large elections in Norfolk in 1918. The Court will briefly review that history, much of which is not in dispute.

The City of Norfolk received its Charter from the Crown and was incorporated as a borough in 1736. In 1845, Norfolk was incorporated as a city by the Virginia General Assembly. From 1816 to the present, the City Charters have provided for the at-large election of various municipal offices. The 1845 City Charter provided for a bicameral city council, consisting of the Common Council, which was elected at-large, and the Select Council, which was selected by the Common Council from amongst its own members. In 1873, the City Charter was amended to provide for the election of members of the Common Council from wards. The members of the Common Council continued to appoint the members of the Select Council. The mayor continued to be elected at-large.

In 1882, the Virginia General Assembly adopted a new charter for the City of Norfolk, which provided for the election of the Common Council members from wards and the at-large election of the Select Council. The mayor was

still to be elected at-large. Thereafter, control of the General Assembly changed hands, and in 1884 a new Norfolk Charter was adopted, which was indentical to the one adopted in 1873.

As a result of the adoption of the Virginia Constitution in 1902, which provided for a literacy test and a poll tax, most blacks and some whites were effectively disenfranchised. As a result of the imposition of these measures, black voter registration in Norfolk declined from 1,826 in 1900 to 504 in 1902. White voter registration also declined, from 6,732 in 1900 to 4,698 in 1902. The number of registered black voters, according to the State poll tax records for the City of Norfolk, fluctuated during the next fifteen years. The 1911 annexation of Huntersville, a predominantly black area, from Norfolk County resulted in an increase of from 38 to 154 registered black voters in that year. White voter registration also fluctuated during the period.

In 1906, the Virginia General Assembly adopted a new Norfolk Charter, which provided for the election of a Common Council of not less than fourteen nor more than forty members and a Board of Aldermen of not less than eight nor more than thirty members, each to be elected from wards. A three-member Board of Control, with combined legislative and administrative powers, was to be elected at-large. City officers, such as the Commonwealth's attorney, commissioner of revenue and city treasurer were to be elected at-large.

Efforts toward municipal reform were begun in Norfolk in 1913, by members of the Citizens Party, a group whose prime concerns were religion and morality. The black citizens of Norfolk were often associated with the Citizens Party. Members of the Norfolk Chamber of Commerce, which favored the adoption of a city manager form of government, were also aligned with the Citizens Party.

In August, 1915, the issue of whether to create a charter commission to study the adoption of a city manager form of government was submitted to Norfolk's voters. The measure was supported by a majority of those voting, but failed because it was not approved by a majority of all registered voters, as required by State law. The 1915 referendum had the support of the Norfolk Chamber of Commerce and the Citizens Party.

No further efforts for a new charter occurred until 1917, when State law was changed to allow voter approval of a charter change by a majority of the votes cast instead of by a majority of registered voters. In June, 1917, Norfolk's voters approved the establishment of a charter study commission. The Charter Commission issued the proposed charter in September, 1917, which provided for a city manager form of government and the at-large election of a small city council. A referendum on the adoption of the new charter was set for November 20, 1917.

The main dispute between the plaintiffs' and defendants' historians concerns the interpretation to be accorded a series of advertisements which appeared in *The Virginian-Pilot* newspaper in the days before the election. The plaintiffs' expert, Dr. McCrary, conceded that but for the appearance of these advertisements, he "would have found it easier to believe that the race issue did not surface." (Tr. 412). The Court is of the opinion that prior to November, 1917, race was not an issue in the charter change campaign.

The issue of race was first raised by opponents of the charter change on November 9, 1917, according to newspaper accounts. They charged that the new charter would increase the political power of blacks because of the abolition of the white primary. The first advertisement raising the issue of race appeared in *The Virginian-Pilot* on November 13, 1917, seven days before the referendum. In that advertisement, headlined "The New Charter a Danger

to White Supremacy," the opponents of the charter change claimed that passage of the charter would result in the qualification to vote of "nearly 2,000 Negro men." (Plaintiffs' Exh. 43). The opponents of the charter change repeated many of the same allegations in a November 16, 1917 advertisement entitled "White Supremacy."

The proponents of the new charter responded to the opponents' allegations in a November 17, 1917 advertisement headlined "Don't Let The Bosses Play Upon Your Sentiments." (Plaintiffs' Exh. 43). In the advertisement, the proponents argued that the issue of white supremacy and the black vote was irrelevant because the state qualifications for voting would remain the same under the 1902 Constitution. They repeated this argument in a November 19, 1917 advertisement.

After reviewing these advertisements, the Court adopts the view of defendants' expert, Dr. Stewart, that the issue of race was first raised by the opponents of the new charter and that the proponents of the new charter attempted to convince the voters that the real issue was efficient local government, not "the colored question." (Plaintiffs' Exh. 43). The charter proponents tried to convince the voters that the charter opponents were trying to distract them from the real issue, that is, whether a city manager form of government would be more effective.

On the date of the referendum, November 20, 1917, the state poll tax records show that approximately 360[2] blacks and approximately 7,910 whites were registered to vote in Norfolk. Based on these figures, blacks constituted just over 4% of the Norfolk electorate. In the most identifiably black precinct in the City, in Huntersville, there were be-

---

[2] According to the plaintiffs' expert, Dr. McCrary, there were 361 blacks registered to vote on the day of the referendum. The defendants' expert, Dr. Stewart, cites a figure of 358. The Court has therefore used an approximate figure of 360.

tween 100 and 200 blacks qualified to vote in the charter referendum. The voters in that precinct approved the new charter by a vote of 121 to 32.

In 1918, the Virginia General Assembly adopted the new Norfolk City Charter. It provided for a five-member City Council, whose members were to be elected at-large for four-year terms. The terms were staggered such that three seats were to be filled during one election and the remaining two seats would be filled in an election two years later. The city manager was to be appointed by the Council. The mayor was to be elected from amongst the Council members.

C. The At-Large System To date

In 1949, the Norfolk City Council agreed unanimously to recommend to the Virginia General Assembly that the number of seats on the Council be increased from five to seven. According to the November 9, 1950 *Virginian-Pilot* article reporting passage of the referendum raising the Council membership to seven, black voters were "greatly in favor of the change." (Defendants' Exh. 38). The first election to a seven-member Council occurred in 1952.

In 1968, the City Council adopted a resolution which created an Advisory Study Commission to study and evaluate the Norfolk Charter of 1918. The Commission, after much deliberation and consideration of public comments, issued its report on November 3, 1971. The nine-member Commission unanimously recommended the retention of the at-large system for election of the members of Council because "councilmen should be elected by and be responsive to the entire community rather than a portion of it." (Defendants' Exh. 44). The report added that the "Commission wishes to avoid the dangers of a ward or district system which might encourage councilmen to look after the interests of their own district at the expense of the overall interest of the entire City." (Defendants' Exh. 44). Edward Delk, a black attorney,

was a member of the Commission. He testified at trial that he continues to favor retention of the at-large system.

The 1918 Norfolk Charter continues to be in effect today.

D. Extent of History of Official Discrimination

The early history of Virginia demonstrates efforts to defeat black participation in electoral politics. Black voters were effectively disenfranchised as a result of the 1902 Constitution, which imposed the literacy test and poll tax. The literacy test remained in effect until passage of the Voting Rights Act in 1965. The poll tax was declared unconstitutional by the Supreme Court in 1966. *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966). Blacks were also precluded from participating in the primary elections of the Virginia Democratic Party by the "white primary" rule which went into effect in 1912. The "white primary rule" was declared unconstitutional by the United States Court of Appeals for the Fourth Circuit in 1930. *Bliley* v. *West*, 42 F.2d 101 (4th Cir. 1930).

Prior to the passage of the Voting Rights Act in 1965, black voter registration in Norfolk was proportionately lower than that of whites. In 1960, for example 50% of the white voting age population was registered to vote while only 25.3% of the black voting age population was registered. By October, 1964, black registration had increased to 35% of the black voting age population, while white registration had decreased to 46% of the white voting age population.

Since the passage of the Voting Rights Act in 1965, the black voter registration rate and turnout rate, based on a percentage of the black voting age population, has increased to the point that today it exceeds that of Norfolk's white population. Currently, the black voter registration rate, based on a percentage of the black voting age population, exceeds that of whites, whether one looks at the

figures offered by the plaintiffs' experts or at those offered by the defendants' experts. The plaintiffs' figures show a white registration rate of 51.2% of the white voting age population and a black registration rate of 52.9% of the black voting age population under regression analysis. Under the plaintiffs' homogeneous precinct analysis, the white registration rate is 53.1% of the white voting age population and the black registration rate is 55.3% of the black voting age population.[3]

The black voter turnout rate, based on a percentage of the black voting age population, also currently exceeds that of white voters. The plaintiffs' figures show that the black turnout rate, based upon a percentage of the black voting age population, exceeded the white turnout rate in both the 1982 and 1984 City Council elections. In the May 1, 1984 election, the plaintiffs' figures show that the black turnout rate exceeded the white turnout rate by 11%.[4]

The City has made extensive efforts to increase voter registration and to make the registration process more accessible. According to the City's General Registrar, Ann Washington, as of May 31, 1984, there are twelve satellite voter registration offices located throughout the City of Norfolk. At least seven of these twelve satellite offices are located in or adjacent to predominately black areas. In addition, the City applied for and received blanket cov-

---

[3] These figures exclude the population on Norfolk's Naval bases or ships home ported in Norfolk. This excluded population is predominantly white and has a low voter registration rate. Inclusion of this military population would result in a white registration rate of 37% of the white voting age population and a black registration rate of 57% of the black voting age population under regression analysis, according to the defendants.

[4] Again, the plaintiffs' figures exclude the predominately white military population. Inclusion of this population would show a black turnout rate, based on a percentage of the black voting age population, three times higher than that of whites in the 1984 election, according to the defendants.

erage permission from the Department of Justice under Section 5 of the Voting Rights Act to conduct voter registration drives. Such registration drives have been conducted at food stamp distribution centers, the Division of Motor Vehicles, high schools and multiservice centers.

The Court finds that despite an early history of discrimination in Virginia against blacks in terms of their ability to participate in the electoral process, Norfolk's black citizens today participate in the electoral process equally with white citizens. The procedures and facilities of the Registrar's Office are fair and equally accessible to all of Norfolk's citizens.

E. Racial Polarization

The plaintiffs and the defendants each offered their own definitions of "racially polarized voting." The plaintiffs' expert, Dr. Richard Engstrom, opined that racially polarized voting occurs when the majority of one racial group votes contrary to the majority of another racial group. The defendants' expert, Dr. Timothy G. O'Rourke, suggested that three factors must be examined in order to determine whether racially polarized voting has occurred. First, the presence or absence of "white backlash," that is, whether white voters turn out in greater numbers than usual in response to the potential election of black candidates. Second, the voting patterns of black and white voters over a period of years. Finally, whether whites attempt to limit the field of candidates.

The Court rejects the definition of racially polarized voting offered by Dr. Engstrom in favor of that presented by Dr. O'Rourke. Under Dr. Engstrom's definition, most of the elections in this country, including Presidential elections, would be characterized as racially polarized. For example, as Dr. Engstrom conceded, black voters consistently and overwhelmingly support Democratic Presidential candidates. In addition, Dr. Engstrom's definition would be more appropriate in a head-to-head race than in an

election such as that for the Norfolk City Council in which a voter may select more than one candidate. A vote for one candidate is not necessarily a vote against another candidate.

The Court is of the opinion that the definition offered by Dr. O'Rourke is a more sensible one. It is more applicable to the multiple-candidate, multiple-office Norfolk City Council elections. It is not overly broad, as is Dr. Engstrom's definition. Additionally, it more effectively considers voters' motivations in selecting particular candidates. Furthermore, Dr. O'Rourke's definition is consistant with the definition adopted by those few courts which have discussed the definition of racially polarized voting. *See, e.g., United States* v. *Dallas County Commission*, 548 F. Supp. 875, 904-05 (S.D. Ala. 1982). The Court will therefore employ Dr. O'Rourke's definition in determining whether the Norfolk City Council elections may be characterized as racially polarized.

1. White Backlash

Norfolk's white voters have not turned out in greater numbers than usual in response to the potential election of black candidates. For example, in the 1984 election there were two strong black candidates, Rev. John Foster and Evelyn Butts, yet the percentage of white registered voters who turned out to vote was substantially lower than the percentage of black registered voters who turned out to vote. As a matter of fact, the 1984 turnout rate for whites, as a percentage of the white voting age population, was lower in 1984 than in any of the three previous elections. The plaintiffs' expert, Dr. Richard Engstrom, conceded that he found no evidence of white backlash.

2. Voting Patterns

Since the City does not maintain voter registration or turnout figures by race, statistical estimates of voting behavior were used by both the plaintiffs and the defendants.

Such statistical estimates are subject to a variety of interpretations and can obviously be manipulated to support the desired result. An additional problem with these statistical estimates is that they are limited to raw numerical data, and in no way can they be said to reflect the rationale behind an individual's selection of a particular candidate.

The plaintiffs rely on two statistical studies, one prepared by Carl Peterson and Kimball Brace ("the Brace report")[5] and one prepared by Dr. Richard Engstrom, to prove that voting in Norfolk City Council elections is racially polarized. These two statistical analyses employed data consisting of the number of registered voters in each precinct, the number of votes cast for each candidate in each precinct, and the racial composition of each of the City's 54 precincts, as determined from the 1980 Census maps. Neither of the plaintiffs' experts' studies considers factors other than race which may greatly influence voting behavior. These factors include a voter's age, ethnicity, education and income. Other factors which may influence voting behavior include incumbency, campaign expenditures, endorsements and name recognition. None of these factors were considered in the Brace report or Dr. Engstrom's report.

That these factors are relevant become clear if one examines, for example, the effect of incumbency on City Council elections. An examination of the elections from 1968 through 1984 shows that the incumbency success rate is over 79%. In four of the nine elections, every incumbent who sought reelection was reelected. Since 1974, every black incumbent who has sought reelection has been reelected. There is a high correlation between incumbency and election to the City Council. Yet, the plaintiffs, while admitting that incumbency plays a role in City Council

[5] In referring to the Brace report, the Court refers to the third and final study prepared by Peterson and Brace, Plaintiffs' Exhibit 50-B.

elections, failed to adjust their figures to account for this factor.

Without going into great detail, the Court is convinced that the Brace report and Dr. Engstrom's report contain a number of methodological problems which cause the Court to doubt the credibility of the reports. Primary among these are the exclusion from both the Brace and Engstrom reports of those residing on Naval bases within the City limits or stationed aboard ships home ported in Norfolk. These individuals are eligible to register to vote in Norfolk City Council elections. This military population is included in the 1980 Census figures for Norfolk, and was included by the General Assembly of Virginia in the drawing of district lines for the election of the members of the Virginia Senate and House of Delegates, the State legislative bodies.

The plaintiffs' experts' reason for excluding this military population is that they are largely unregistered to vote and do not participate in City Council elections. Yet, the plaintiffs inexplicably included the City's student population, despite the fact that students also tend to be inactive members of the electorate. In addition, the plaintiffs' experts include in their studies the over 11,000 military personnel living off the Naval bases in private homes in the City.

The Court is convinced that this military population was excluded because of the effect of its exclusion on estimates of white voter participation. The racial composition of this excluded population is 84.5% white and 15.5% black, according to the 1980 Census data. Of the 33,892 members of the excluded military population who are of voting age, 84.3% are white and 15.7% are black. Exclusion of this population would have the effect of increasing white voter registration and turnout figures and, consequently, of decreasing black voter participation figures, as Dr. Brace conceded. The Court is of the opinion that the exclusion

of these 33,892 potential voters in the plaintiffs' experts' studies improperly skews the results of their studies.

A second methodological problem with the plaintiffs' experts' reports was their inclusion of the so-called "other population" in with the figures for the white population when preparing and analyzing the data. This "other" population, amounting to between three and four percent of Norfolk's population, includes Asians, Native Americans and others. In other words, the plaintiffs' experts included all non-blacks in their definition of whites. The plaintiffs' experts' reports purport to compare white and black voting behavior, yet they include non-white voters within the white category. This results in an increase in the number of white registered voters and in the white voter turnout in comparison to that of black voters.

The defendants relied on the testimony of Dr. Timothy G. O'Rourke and Dr. Justin G. Green to support their contention that voting in Norfolk City Council elections is not racially polarized. Dr. O'Rourke, in contrast to the plaintiffs' experts, considered such factors as endorsements and campaign expenses in reaching his conclusions. Drs. O'Rourke and Green avoided the methodological problems which the Court believes the plaintiffs' experts' studies suffer from. They did not exclude the military population from their analyses, nor did they include the "other" population in their studies. In addition, they went beyond the election figures, and studied newspaper articles and other data in reaching their conclusions. The Court attaches greater weight to the analyses of the defendants' experts Drs. O'Rourke and Green than to the studies of the plaintiffs' experts Dr. Engstrom, Brace and Peterson, finding them to be more credible and persuasive.

The Court's review of these studies and analyses leads it to conclude that the voting patterns reveal a substantial crossover vote. For example, in the 1978 election, 32.2% of the white voters supported Rev. Joseph N. Green, Jr.

in his first election. In 1982, Rev. Green received the support of 31.1% of the white electorate. In 1984, Rev. John Foster was supported by 26.6% of the white voters. These figures show a willingness by white voters to cross racial lines when voting in City Council elections. The Court also notes that a substantial number of black voters have shown a willingness to vote for white candidates, particularly in the elections of Elizabeth Howell in 1974, 1978 and 1980, in which she received the support of a majority of black voters.

Further study of the election results reveals the importance of coalition politics in Norfolk City Council elections. Both plaintiffs' and defendants' experts agree that none of the three winning candidates in 1984 would have been elected without the support they received from both black and white voters.

The Court's review of the studies also shows that a number of unsuccessful black candidates failed to receive the support of even a majority of black voters. For example, in 1984, two black candidates, Theodore Hall and Joseph Rose, received only 8.9% and 18.7% of the votes cast by blacks, respectively. In 1982, black candidates Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs, were supported by only 27.5% and 29.6% of the black voters, respectively. In the 1980 election, George H. Banks, a plaintiff in this lawsuit, received only 34.5% of the votes cast by black voters. Another of the plaintiffs in this action, Dr. Milton A. Reid, received the support of only 36.4% of the blacks voting in the 1974 election. These black candidates were obviously not the candidates of choice of the black voters in those elections.

Between 1974 and 1984 there have been sixteen black candidates for the Norfolk City Council. Four of those candidates have been elected. Eight of the remaining black candidates failed to receive the support of even a majority

of the black electorate. The remaining four black candidates are actually only two individuals: Evelyn T. Butts in 1980, 1982 and 1984, and Lenious G. Bond in 1972. Mrs. Butts would most likely have been elected in 1984 had she received the same level of black support she received in her earlier races, which dropped from a high of 92.9% in 1980 to 72.1% in 1984.

The Court also finds, as the parties agree, that the current rate of black voter registration and turnout is proportionately higher than that of the white population. One would expect the opposite to be true under a racially polarized voting system with a majority of white voters. After thoroughly reviewing the voting behavior studies presented by the plaintiffs and defendants, the Court finds that the voting patterns in Norfolk City Council elections do not reflect racial polarization.

3. Efforts to Limit the Field of Candidates

The field of candidates in City Council elections since 1968 has ranged from eight in 1968, when three seats were available, to twenty-one in 1974, when four seats were available. In the most recent election, held May 1, 1984, ten candidates sought to fill three seats on the Council. For the elections which were held from 1968 through 1984, the average number of candidates per election was thirteen.

The evidence fails to disclose any effort on the part of whites to limit the field of candidates and the statistics support this conclusion. There was no evidence offered to suggest that any individual who desired to seek a position on the City Council was prevented or even dissuaded from doing so.

4. Summary

In summary, the Court finds no evidence of white back-lash. The Court further finds that a thorough examination of the voting behavior of Norfolk's black and

white voters fails to reveal a racially polarized electorate. Finally, the Court finds no evidence of efforts by whites to limit the field of candidates. Applying Dr. O'Rourke's definition of racially polarized voting, the Court concludes that voting in Norfolk City Council elections is not racially polarized.

F. Enhancing Factors

1. Existance of Unusually Large Election Districts

Under the at-large system, the election district obviously consists of the entire fifty-three square mile City. The Court is not convinced, however, that the size of the election district, that is of the City, enhances the opportunity for discrimination against black residents. Although the plaintiffs allege that it would be easier and less costly to run for the City Council under a ward system, they presented no statistical evidence to support this contention. It is conceivable that there would be no decrease in the cost of running for City Council under a ward system because head-to-head competition may in fact cause costs to escalate.

2. Majority Vote Requirements

There is no majority vote requirement in Norfolk City Council elections. Council members are elected by plurality of the votes cast, regardless of whether they have received a majority of the votes cast. In fact, in every City Council election from 1968 through 1984, the candidate with the lowest total vote of those elected has received less than 50% of the vote. Four of those candidates with the lowest winning total received less than 45% of the votes cast.

3. Anti-Single-Shot Provisions

There are no prohibitions against casting single-shot ballots in Norfolk City Council elections. In fact, the evidence shows that black voters have on occasion successfully employed single-shot tactics.

4. Staggered Terms

The members of the Norfolk City Council serve staggered four-year terms. Generally, four seats are filled in one election and three seats are filled in the following election. In two of the nine elections held since 1968, however, more than four seats were up for election. Six seats were available in 1970 and five seats were available in 1978, due to vacancies on the Council.

The plaintiffs allege that staggered terms increase the likelihood of head-to-head racial contests and minimize the effect of single-shot voting. If, as the plaintiffs allege, staggered terms have a discriminatory effect upon Norfolk's City Council elections, it would be expected that in those years in which the fewest seats were up for election blacks would be unsuccessful in seeking office. To the contrary, in four of the five elections held since 1968 in which three seats were available a black has been elected, that is, Joseph Jordan in 1968, 1972, and 1976, and Rev. John Foster in 1984.

Furthermore, the plaintiffs' allegation with regard to head-to-head contests is not supported by the evidence. The field of candidates in City Council elections since 1968 has ranged from eight in 1968, when three seats were available, to twenty-one in 1974, when four seats were available. For the elections which were held from 1968 through 1984, the average number of candidates per election was thirteen. The large field of candidates in Norfolk City Council elections minimizes the likelihood of head-to-head contests.

5. Numbered Post or Residency Requirements

There are no numbered post or residency requirements governing Norfolk City Council elections. A numbered post requirement, which would require candidates to seek particular seats on council, would create head-to-head contests, which the plaintiffs find objectionable. A residency

requirement, which would in effect be equivalent to a numbered post requirement, similarly would encourage head-to-head contests.

6. Summary

In summary, the Court finds that the City has not used any of the enumerated voting practices or procedures to discriminate against black voters.

G. Candidate Slating

Defense witness Dr. Timothy J. O'Rourke, a University of Virginia political scientist, defined a slating group as "a permanent or semipermanent organization who [sic] recruits candidates to run for office. Having recruited them, [it] puts them up as a slate for as many seats as are open, and organizes a campaign and promotes those candidates in a campaign as a slate." (Tr. 1961-62). As an example of slating groups, Dr. O'Rourke cited political party organizations. (Tr. 1962). The Court adopts the definition of a slating group offered by the defendants.

The plaintiffs allege that an all-white group of businessmen, referred to as the "westside businessmen's coalition" during the trial, has twice run a slate of all-white candidates and that no blacks were ever asked by the members of the group to run on its slate. The plaintiffs refer to the 1976 election in which Vincent J. Thomas and G. Conoly Phillips ran for election together and the 1980 election in which Thomas and Phillips ran with Joseph A. Leafe.

The plaintiffs implied throughout the trial that this "westside businessmen's coalition" has sufficient influence to determine who will be elected to the City Council. The plaintiffs offered no evidence, other than the testimony of the plaintiffs themselves, that this "westside businessmen's coalition" is a slating organization and the Court finds that this group does not constitute a slating organization as defined by Dr. O'Rourke. When Thomas and Phillips

ran together in 1976, although there were three seats up for election, the two candidates did not ask a third candidate to run with them. A slate, as defined by Dr. O'Rourke, consists of as many candidates as there are seats available. Accordingly, the Thomas-Phillips ticket could not constitute a slate. While Phillips and Thomas may have been asked to run by individual members of the business community, there is no evidence that they were recruited to run by a slating organization.

With regard to the 1980 election, Joseph Leafe testified that he was asked to run by then Mayor Thomas. Leafe had decided not to run again for the Virginia House of Delegates, in which he had served as a member from 1972 to 1980. Leafe stated that he did not have discussions with either Joshua Darden or Harvey Lindsey, identified during the trial by the plaintiffs as leaders of the "westside businessmen's coalition," before he decided to run. Leafe was not recruited to run by any single group; rather he was encouraged to run by voters from throughout the City. Leafe ran with Thomas and Phillips in 1980 and the three shared election expenses. They did not consider themselves to be a businessmen's slate. Leafe and Thomas were elected; Phillips was not. There is no evidence that the three candidates were recruited by a slating organization. It is more likely that the two incumbents, who had run together successfully in the 1976 election, sought a third candidate who shared their stance on the issues and who would be willing to share campaign expenses. The plaintiffs' theory, that this so-called "westside businessmen's coalition" is controlling the Norfolk City Council elections, is not supported by credible evidence.

The only possible example of slating by an organization in Norfolk City Council elections, as established by the evidence, occurred in 1982, when the City Democratic Committee endorsed a biracial slate of two black and two white candidates. The two black candidates who were members of that slate were Herbert M. Collins, a plaintiff

in this action, and James F. Gay, counsel for the plaintiffs in this action. All four of the candidates who ran on the Democratic Committee slate failed to win election.

Both the plaintiffs and defendants agree that the Concerned Citizens of Norfolk, a black political organization, has endorsed both black and white candidates for Council, but that the group is not a slating organization because it neither recruits candidates for office nor runs the endorsed candidates on a slate.

In summary, the Court finds that the only possible candidate slating by an organization which has occurred in Norfolk City Council elections occurred in 1982, when the City Democratic Committee endorsed a biracial slate of candidates. The Court further finds that the plaintiffs failed to prove the existence of a candidate slating organization which denies black candidates access to the process.

H. Socio-economic Disparities

1. Education

According to the 1980 Census, the percentage of adult blacks (25 years or older) in Norfolk with no more than an elementary school education is 31.15%, a drop of 16.18% from the figure reported in the 1970 Census. The percentage of adult blacks in Norfolk with less than four years of high school education is 55.3%, according to the 1980 Census, a drop of 18% from the 1970 figure. By way of comparison, 1980 Census figures show that 12.0% of Norfolk's adult whites have only an elementary school education, and that 29.8% of the adult white population has less than four years of high school education. Of the total adult population with four or more years of college, blacks comprised 16.48% and whites 72.2%. The 1970 figure for blacks was 12.95%, showing an increase in the number of college educated blacks.

2. Income

According to the 1980 Census statistics, 35.46% of all black persons residing in Norfolk have incomes below the poverty level, compared to 11.5% of all white persons. This figure reflects a drop of almost 4% from 1970 for black persons. The 1980 Census figures also show that the median income for Norfolk's whites is $17,548, while the median income for Norfolk's blacks is $10,258.

3. Housing

According to the 1980 Census, over 10% of all housing units occupied by blacks have more than one person per room, as compared with less than 2% of white-occupied households. The 1970 Census figures reflect a decrease in black households having more than one person per room of over 8% over the last decade. The 1980 Census figures also reflect that the median value of white owner-occupied households exceeds that of black owner-occupied households by $11,100.

4. Employment

The 1980 unemployment rate for blacks (11.9%) is more than twice that of whites (5.3%).

5. Health

The plaintiffs assert that the 1982 infant mortality rate and 1982 rate of new cases of tuberculosis in Norfolk were higher for blacks than for whites. The Court is unable to verify these figures because the plaintiffs did not indicate the source of their figures.

6. Effect of Socio-economic Disparities

Despite the disparities between the black and white citizens of Norfolk in the area of education, employment, housing and income, the voter participation figures show that they have not hindered the participation of Norfolk's blacks in the electoral process. Blacks are registering to

vote and turning out to vote at rates equal to or greater than the rate for whites, based on a percentage of the voting age population.

One longtime observer and participant in Norfolk politics, Judge Joseph A. Jordan, Jr., a black former City Council member testified that the failure of blacks to vote in Norfolk elections cannot be blamed on the economic status of blacks. He places the blame, at least in part, on the black leadership's failure to continue efforts begun in the 1950's aimed at achieving total black suffrage in Norfolk, and which were subsequently discontinued by the blacks. (Tr. 1521-23).

The Court is pleased to note that the position of Norfolk's black residents has improved in the areas of education, housing and employment in recent years. This may well be in some part due to their continued and increasing participation in the political process.

I. Racial Appeals

The plaintiffs point out only one City Council campaign that they contend was characterized by appeals to the racial prejudices of white voters. The plaintiffs allege, and their expert Dr. Jerry Himelstein, a sociologist, testified, that the 1982 campaign was characterized by subtle and overt racial appeals. Dr. Himelstein's conclusion was based solely on a study of newspaper accounts of the 1982 campaign during the four months preceding the election. He testified that the two dominant themes which emerged were public school busing as a racial issue and the issue of black representation on the City Council.

Dr. Himelstein testified that his opinion that the school busing issue constituted a racial appeal was confirmed by an examination of the Brace report's 1982 election statistics and by a letter from former Lieutenant Governor Henry E. Howell, Jr. to then Mayor Vincent Thomas, which appeared in *The Virginian-Pilot*. Dr. Himelstein suggested

that the issue of busing effected the outcome of the election because the three white candidates who were elected, Dr. Mason C. Andrews, Claude J. Staylor, Jr. and Robert E. Summers, all opposed busing. The Court believes, however, that the election of these three candidates can as easily be attributed to their incumbency, and that Dr. Himelstein's suggestion that they were elected because of their opposition to busing is unsubstantiated.

Dr. Himelstein's other so-called confirmation of his analysis, the Howell letter to Thomas, is equally lacking in validity. Howell testified that his letter, in which he urged Thomas to reconsider his opposition to busing, "didn't have anything to do with the campaign." (Tr. 1584). Howell further testified that he never heard any discussions of busing by candidates during the 1982 election that he would characterize as racial appeals.

The Court concludes from the evidence that the issue of public school busing was a legitimate public concern and not an appeal to racial prejudices. Both black and white candidates addressed the issue of busing during the 1982 campaign, although many of the candidates spoke to the issue reluctantly and often only when questioned by the public about their stance on the issue. The evidence fails to show that any of the candidates intended to, or did in fact, use the issue to appeal to the racial prejudice of voters.

Dr. Himelstein also testified that news accounts of the 1982 campaign frequently discussed the race of the candidates and raised the issue of black representation on the Council. It appears to the Court, from reading the newspaper accounts, that this issue was one raised by the black candidates. There was no evidence that this issue constituted an appeal to the racial prejudice of voters.

The Court concludes that the evidence fails to show that the 1982 campaign was characterized by subtle or overt racial appeals. In fact, Rev. Joseph N. Green, Jr., a black

member of the Council, was reelected in the 1982 election with the support of over 30% of the white voters. The statistics indicate that Rev. Green received approximately the same support from white voters in 1982 as he received in the 1978 election, indicating no withdrawal of white support from Rev. Green, who favored school busing. The plaintiffs do not suggest that racial appeals were made in any other City Council election.

J. Election of Blacks to Public Office

Blacks currently hold elective positions on the Norfolk City Council, in Norfolk's delegation to the Virginia House of Delegates, and as the sheriff of the City of Norfolk. Two blacks, Revs. Joseph N. Green, Jr. and John Foster, currently serve on the seven-member City Council. Two blacks, William P. Robinson, Jr. and Dr. Yvonne Miller, are members of Norfolk's five-member delegation to the Virginia House of Delegates. The sheriff of the City of Norfolk is David Mapp, a black.

Since at-large elections were instituted in 1918, three blacks have been elected to membership on the Norfolk City Council. At least one black has served on the Council continuously since 1968. Joseph A. Jordan, Jr., a black, was first elected to the City Council in 1968 and was reelected in 1972 and 1976. He served as vice mayor during his last two terms, a position to which he was elected by the members of the Council. Following Jordan's appointment to a judicial position in 1977, Rev. Joseph N. Green, Jr., a black, was appointed to fill Judge Jordan's unexpired term. Rev. Green was elected to the Council in 1978 and again in 1982. He has served as vice mayor since 1982 and was recently reelected to that office. Rev. John Foster, a black, was elected to the City Council on May 1, 1984.

As a result of Rev. Foster's election, two blacks, Revs. Green and Foster, will serve on the seven-member Council through June 30, 1986. The plaintiffs insinuated through-

out the trial that the election of Rev. Foster to the Council, which occurred after the filing of this lawsuit, was an attempt by unnamed white city officials and other community leaders to moot this action. The plaintiffs point to former Mayor Vincent Thomas' decision to forgo seeking reelection in 1984, and suggest that his decision was part of this alleged conspiracy. Mayor Thomas stated that he decided not to seek reelection in 1984 for personal reasons. He further stated that his support for the election of a second black to Council predated the filing of this action and the Court is not persuaded to the contrary by the plaintiffs' innuendo. There is no evidence that the election of Rev. Foster was orchestrated by white city officials or community leaders in an attempt to moot this action.

Norfolk's delegation to the Virginia House of Delegates has included at least one black member since 1969, when William P. Robinson, Sr. was first elected. Robinson, Sr. served in the House of Delegates until his death in 1981. Following his death, his son, William P. Robinson, Jr., was elected a member of Norfolk's delegation to the House of Delegates and he remains a member, having been reelected in 1983. In 1982, Norfolk was divided into single-member districts for the election of members of the House of Delegates, those elections having previously been conducted at-large. In the 1982 special election, the first conducted under the single-member districts plan, Robert Washington, a white, defeated William Swindell, a black and a plaintiff in this lawsuit, in a head-to-head race to represent the newly created 89th District, a predominently black district. In 1983, Delegate Washington declined to seek reelection, and Dr. Yvonne Miller, a black, ran unopposed for election to the House of Delegates from the 89th District. Consequently, two of the five current members of Norfolk's delegation to the Virginia House of Delegates are black, Delegates Miller and Robinson.

David Mapp became the first black elected to a constitutional office in Norfolk when he was elected sheriff in

1981. In the primary election, Sheriff Mapp defeated a white challenger in a head-to-head contest. In the general election he overwhelmingly defeated three white candidates. Sheriff Mapp received the endorsements of the outgoing sheriff, a white, and the Democratic party.

K. Responsiveness

1. Appointments to Boards and Commissions

The plaintiffs contend, and their expert Dr. Loren Solnick, a labor economist, testified, that black residents are underrepresented on Norfolk's appointive boards and commissions. The parties have stipulated to the racial composition of the 58 boards, commissions and authorities appointed in whole or in part by the Norfolk City Council. Of the 438 appointive positions, 344, or 78.54%, are filled by white residents and 94, or 21.46%, are filled by black residents. Seventeen of the boards and commissions are all-white, including the Granby Mall Advisory Commission, the Municipal Bond Commission, the Police-Fire Trial Board, and the Tidewater Community College Board. One of the boards, the Southeastern Tidewater Opportunity Project Board of Directors, is all-black. Two of the boards and commissions have a majority black membership and an additional two have an equal number of black and white members.

These figures, taken alone, would suggest, as Dr. Solnick testified his study shows, that blacks are indeed underrepresented on the City's appointive boards and commissions, considering that blacks constitute 31.48% of Norfolk's voting age population and only 21.46% of the appointive positions are held by blacks. The defendants presented evidence, however, in the form of City ordinances, which shows that in order for a citizen to serve on certain boards and commissions he or she may be required to meet certain criteria. Such criteria include special knowledge, experience, training or education in the relevant field.

In addition, some of the members of certain commissions and boards are required to be representatives of particular groups or sectors of the community. For example, City Code Section 31.47 provides that the five members of the Granby Mall Advisory Commission shall consist of: one representative of the Norfolk Redevelopment and Housing Authority, one representative of the Downtown Norfolk Association, one representative of the Norfolk Chamber of Commerce, one representative of the Retail Merchants Association, and one representative of downtown business interests. Over seventy-five of the seats on boards and commissions carry with them special qualifications as contained in the City ordinances.

The plaintiffs' expert, Dr. Solnick, assumed in his study that every person in the voting age population is eligible to serve on the boards or commissions. This is obviously a flawed assumption, as demonstrated by the evidence offered by the defendants. When confronted with the defendants' evidence, Dr. Solnick admitted that he failed to consider these special requirements in his study. The plaintiffs failed to respond with any more accurate figures, which would take into account the special qualifications needed to serve on many of the boards and commissions, despite having the opportunity to do so on rebuttal. The plaintiffs having failed to present an accurate study upon which the Court could base an evaluation, the Court is unable to find that the City has failed to appoint blacks to boards and commissions in proportion to their representation in the voting age population of the City. The Court notes, however, that blacks are well-represented on the more important boards and commissions, such as the School Board, the Norfolk Redevelopment and Housing Authority Board of Commissioners, the City Planning Commission, and the Civil Service Commission.

2. City Employment

The plaintiffs contend, and their expert Dr. Loren Solnick testified, that his study shows that blacks are under-

represented in City government supervisory positions, as well as in the Norfolk Police and Fire Departments. The parties have stipulated that as a percentage of total municipal employment, blacks comprised 36.16% of the municipal work force in 1973 and 41.31% of the work force in 1983. According to the City's 1983 EEO-4 report, as amended, the percentage of black city employees in each of the following job categories was:

Officials/Administrators	5.5 %
Protective Services	10.02%
Professionals	31.77%
Paraprofessionals	60.28%
Technicians	23.11%
Office/Clerical	39.48%
Skilled Craft Workers	42.11%
Service Maintenance	81.74%

In Dr. Solnick's study he compared the City's employment of blacks in these eight occupational categories with the 1980 Census data for the Norfolk SMSA, specifically the employment of blacks and whites in comparable occupational groups. The plaintiffs allege, based on Dr. Solnick's study, that blacks are particularly underrepresented in the officials/administrators and protective services categories. The plaintiffs' study found no underrepresentation of city employees in the remaining six categories: professionals, paraprofessionals, technicians, office/clerical, skilled craft workers and service maintenance.

With regard to officials and administrators, Dr. Solnick's comparison included figures from the 1980 SMSA Census tables for public officials and administrators at the federal, state and local levels. The Court agrees with the defendants that the more appropriate comparative group would be

limited to officials and administrators employed at the local level. Using that group as the comparison, the difference between the City's black officials and administrators (5.5%) and the figure drawn from the Census tables (6.5%) is insignificant.

With regard to protective services employees, a category which in the City of Norfolk is limited to police and firefighters, the Court points out that the City's hiring in the Police and Fire Departments has been controlled by a consent decree entered by another Judge of this Court in the case of *United States* v. *City of Norfolk*, Civil Action No. 78-418-N (E.D. Va. Aug. 28, 1978). The evidence shows efforts by the City to recruit black applicants for positions in the Police and Fire Departments. In addition, the percentage of blacks in the City's Police and Fire Departments does not differ significantly from the 1980 SMSA Census figures for blacks employed in police and firefighting occupations.

The Court notes that the plaintiffs did not present any evidence of qualified black applicants being turned down for City employment.

3. Libraries

The parties have stipulated that both in terms of location of libraries and programs offered, the Norfolk City Libraries Department does not discriminate against black citizens and is responsive to the needs of black citizens.

4. Fire Department Services

The parties have stipulated that both in terms of locations of fire stations and responses to fire alarms, the Norfolk Fire Department does not discriminate against Norfolk's black citizens and is responsive to the needs of black citizens.

5. Police Department Services

The plaintiffs offered little evidence of discrimination by the Norfolk Police Department against black citizens. The

Court finds on the basis of the evidence offered by the defendants that the Police Department has undertaken a series of community relations efforts designed to improve its relations with the black community. These efforts include the establishment of a Police Community Relations Unit, the maintenance of storefront operations in black neighborhoods, and the creation of the Block Security and Comprehensive Crime Prevention programs. The Court further finds that the Police Department is responsive to the needs of black citizens.

6. Social Services

The parties have stipulated that in terms of location of facilities and services provided, the Norfolk Department of Human Resources does not discriminate against black citizens and is responsive to the needs of Norfolk's black citizens. The defendants' evidence shows that the City offers a variety of social service and public assistance programs which have primarily benefitted black residents.

7. Health Services

The plaintiffs offered no evidence that the Norfolk Department of Health discriminates against black citizens or is unresponsive to their needs. The Court finds, on the basis of the evidence offered by the defendants, that the City offers numerous health programs which have primarily benefitted black residents.

8. Parks and Recreation

The plaintiffs offered no evidence that the Department of Parks and Recreation is unresponsive to the needs of black citizens. The evidence offered by the defendants shows that City's recreational facilities and services are utilized by black residents at a greater rate than that of white residents.

9. Cemeteries

The plaintiffs offered no evidence that the City's cemeteries are operated in a discriminatory manner, and the

Court finds that the defendants have demonstrated that the City's eight cemeteries are operated on a nondiscriminatory basis.

10. Education

The plaintiffs attempted on several occasions to raise the issue of public school busing in this case. The Court declined to permit them to do so. The Court refers the parties to Judge MacKenzie's opinion in *Riddick* v. *School Board of City of Norfolk*, Civil No. 83-326-N (E.D. Va. July 9, 1984). The plaintiffs have failed to establish any discrimination against black students in the Norfolk public school system. In fact, the Superintendent of Schools is black.

11. Public Works and Utilities

The plaintiffs presented little evidence of a lack of responsiveness by the Department of Public Works to the needs of black residents. The Court finds on the basis of the evidence offered by the defendants that the Department of Public Works provides street lighting, paved roads, drainage, solid waste removal and street cleaning to all parts of the City on a nondiscriminatory basis and is responsive to the needs of black residents. The plaintiffs offered no evidence that the Department of Public Utilities discriminates in its provision of water and sewer services to the City's residents, and the Court finds no such discrimination.

The Court finds that since 1970, the City has expended millions of dollars on capital improvement projects in predominantly black neighborhoods. The parties agree that from 1970 through September, 1983, the City of Norfolk spent over $9.3 million in Berkley, a predominantly black-occupied area of Norfolk, and allocated an additional $3.5 million to be spent. The funds were spent on capital projects including street repairs, a senior citizen center, branch library replacement, fire station replacement and neigh-

borhood facilities program. Of the funds already spent, approximately $6.5 million was federally funded and $2.5 million was locally funded. Of the funds yet to be spent, $.5 million will be federally funded and $3 million will be locally funded.

The parties also agree that from 1969 through October, 1983, the City has spent over $19 million in the Church Street/Huntersville area, another predominantly black-occupied area of Norfolk, with an additional $4.9 million allocated to be spent. The funds were spent on capital improvement projects including street repairs, cemetery repairs, day care center acquisition, and rehabilitation to Young Park, a subsidized housing project. Of the over $19 million already spent, $17.5 million was federally funded and $1.7 million was locally funded. Of the $4.9 million yet to be spent, $4.8 million will be federally funded and $1 million will be locally funded.

12. Housing

a. Code Enforcement

The plaintiffs presented no evidence of discriminatory enforcement of the City Housing Code by the Department of Community Improvement or the Division of Housing Services. The Court is persuaded by the evidence offered by the defendants that the Department of Community Improvement and the Division of Housing are responsive to the needs of black residents, and that many of the programs offered are designed to benefit the City's black citizens.

b. Urban Redevelopment

The plaintiffs contend that the Norfolk Redevelopment and Housing Authority (NRHA) has not been responsive to the needs of black residents. The NRHA was established by the City in 1940, pursuant to State enabling legislation. The Norfolk City Council appoints the NRHA Board of Commissioners. The plaintiffs point out, and the defendants

concede, that of the 21 commissioners who have served on the NRHA since 1940, only three have been black. Two of the five current commissioners, however, are black. The NRHA's main functions are the prevention and removal of slums and blight and the provision of low- and moderate-income housing in Norfolk.

The plaintiffs have alleged that the NRHA has not replaced low-income housing which was demolished through slum clearance programs with other low-income housing on a one-to-one basis. David H. Rice, executive director of the NRHA, testified that this allegation is factually incorrect, and that in fact, the number of low-income housing units which were made available exceeds the number of low-income units which were demolished. According to NRHA figures, during the period from 1950 to the date of trial, the NRHA was responsible for the demolition of 10,900 low-income housing units as part of its slum clearance and urban renewal efforts. During the same time period, NRHA figures indicate that the NRHA was responsible for the production of 9,615 new low-income housing units, made available an additional 552 units under a federally subsidized housing program known as "Section 8," and rehabilitated 74 units using Section 8 funds. In addition, the NRHA, under its own conservation program, rehabilitated another 3,000 units by improving their condition from "substandard" to "standard." Totaling these figures, it appears that the NRHA has made available for occupancy 13,241 low-income housing units during the period from 1950 to the date of trial, over 2,300 more than were demolished during the same period.

These figures, which the Court finds to be credible, rebut the plaintiffs' allegation that the NRHA has not replaced low-income housing on a one-to-one basis. The Court further finds that all persons displaced by NRHA programs are required by NRHA procedures to be relocated into "decent, safe and sanitary housing," and that these procedures have been complied with. (Tr. 1739, 1741).

c. East Ghent

The plaintiffs rely upon the redevelopment of East Ghent to bolster their claim that the NRHA's policies and programs are racially discriminatory. Both parties agree that prior to redevelopment, East Ghent was a severely rundown predominantly black neighborhood. According to NRHA executive director Rice, approximately 1,800 families, almost all of whom were black, were relocated as a result of the East Ghent redevelopment project. The plaintiffs contend that those who were relocated were given indications that they would be able to return to East Ghent when redevelopment was completed. Mr. Rice concedes that in the early stages of the redevelopment project, indications were made that the NRHA would include some subsidized housing in its plans for East Ghent.

A 150-unit federally subsidized housing project for the elderly was the first housing built in East Ghent. In 1974, the NRHA Board of Commissioners made a decision not to locate any additional low-income housing projects in East Ghent. This decision was based upon a desire to attract middle-income families back into the City's downtown area to provide a much needed tax base. Other considerations included the fact that the federal programs that provided subsidies for privately owned housing had been halted in 1974. The City Council approved the NRHA's application to rezone the East Ghent area from R-4 (Multiple Residence District), R-5 (Multiple Residence District), C-1 (Neighborhood Commercial District), C-3 (General Commercial District) and M-1 (Limited Manufacturing District) to PD-H (Planned Development District - Housing) on November 5, 1974 by a 6-1 vote. According to Carroll A. Mason, who was then Area Director of the United States Department of Housing and Urban Development, HUD agreed with the City's assessment of the need to broaden its tax base.

The Court concludes that the NRHA's decision to promote middle-income housing in East Ghent was not racially motivated, but rather was motivated by a genuine desire to broaden the City's downtown tax base. In addition, the Court finds that the NRHA's decision was consistent with the City's efforts to revitalize its downtown area.

d. Community Development Block Grant Programs

Since the mid-1970's, the City has participated in Community Development Block Grant (CDBG) programs administered by the United States Department of Housing and Urban Development (HUD). The CDBG program provides federal funds for such purposes as programs benefitting low- and moderate-income persons. During the years of its participation in the CDBG programs, the City has received nearly $100 million in federal funds.

The plaintiffs have alleged that the NRHA has repeatedly violated federal statutes and regulations with regard to achieving racial balance in public housing projects. The defendants contend that the City's funds have never been reduced, delayed, suspended, or disapproved by the Federal government for any reason, including any violation of federal statutes or HUD regulations. The Court has thoroughly reviewed the testimony and the documentary evidence on both sides. The Court accepts as credible the testimony of past and present NRHA officials that they have had little success in their attempts to achieve racial balance in the City's public housing projects because: (1) HUD regulations require that preference for placement in projects be given to those who have been displaced, and those Norfolk residents who have been displaced are overwhelmingly black; (2) HUD prohibits the use of quotas or preferential treatment on the basis of race to ensure racial balance; and (3) those who seek public housing in Norfolk are predominantly black. The NRHA officials' testimony is supported by the testimony of Carroll Mason,

former Area Manager of HUD. The Court finds that it would be impossible for the City to achieve racial balance in its housing projects when it does not have enough white applicants to achieve that goal.

e. Racial Integration of Neighborhoods

The plaintiffs allege that the City of Norfolk is racially segregated, in large part due to the NRHA's placement of public housing projects in predominantly black neighborhoods. The defendants contend that this is not so, citing the testimony of urban demographer Dr. William A. Clark that Norfolk is "a reasonably well integrated city." (*Riddick*, Tr. 3069). The defendants further rely on Dr. Clark's studies to show that even a random allocation of the City's public housing projects would have had only a minor impact on the racial makeup of the City's neighborhoods. The Court finds no evidence to the contrary and therefore concludes that the plaintiffs have failed to substantiate this claim.

13. Summary

The Court finds evidence of substantial black-employment in City jobs, significant black representation on appointive boards and commissions, considerable expenditures of federal and local funds in black occupied areas, and a nondiscriminatory provision of essential city services and capital improvements to black residential neighborhoods.

L. Tenuousness of Policies Supporting At-Large Elections

The plaintiffs suggest that the use of an at-large election system in Norfolk is pursuant to a tenuous policy. The Court finds, to the contrary, that the policy is by no means tenuous.

As defendants' expert, Dr. Timothy J. O'Rourke, testified, the city manager-council form of government is associated with the at-large election system throughout the

nation. According to a 1981 survey, of the cities nationwide with populations of between 250,000 and 500,000 which have council-manager forms of government, over 75% have at-large elections for council.

All of Virginia's forty-one cities have the council-manager form of government. Only six of those cities do not have at-large elections for council. The cities of Petersburg, Richmond and Lynchburg abandoned at-large elections after Justice Department objections to proposed annexations under Section 5 of the Voting Rights Act. Suffolk's abandonment of the at-large system dates to a city-county consolidation. Hopewell abandoned at-large elections in settlement of a Section 2 action. Winchester, Lynchburg and Hopewell have adopted systems in which some council members are elected from wards and some at-large. The remaining thirty-five Virginia cities have at-large elections.

The Court concludes that Norfolk's policy of at-large City Council elections is consistent with both national and State practices for cities with the council-manager form of government. The Court finds no evidence that Norfolk's at-large election system is the product of a tenuous policy.

M. Black Participation in the Electoral Process in Norfolk

The extent of black participation in Norfolk's elections is best illustrated by an examination of the role which the Concerned Citizens of Norfolk, a black political organization, has played, as well as an examination of the participation of blacks in the City Democratic Party.

1. The Concerned Citizens of Norfolk

Founded in the 1960's, the Concerned Citizens has become the most influential black political organization in Norfolk. The original co-directors of the group were Joseph A. Jordan, Jr. and Dr. William P. Robinson, Sr., both black residents of Norfolk. Dr. Robinson served as a member of

the City's delegation to the Virginia House of Delegates from 1969 until his death in 1981. Joseph A. Jordan, Jr. served on the City Council from 1968 until 1977 and served as vice mayor from 1972 to 1976. He was appointed to a judgeship on the General District Court in 1977. Both were elected repeatedly in at-large elections. Today, the co-directors of the Concerned Citizens are William P. Robinson, Jr., a member of Norfolk's delegation to the Virginia House of Delegates since 1981, and Mrs. Evelyn T. Butts, who has unsuccessfully sought a seat on the City Council three times.

Prior to each election in Norfolk, a committee of the Concerned Citizens interviews the candidates who are seeking the organization's endorsement. The group's endorsements are presented primarily through the issuance of the Goldenrod guide ballot, which lists the names of the endorsed candidates. The guide ballot is widely distributed on election day.

The effectiveness of the Concerned Citizens' endorsements in garnering the votes of black citizens for the endorsed candidates can be seen from a review of several City Council elections. In 1974, for example, the Concerned Citizens endorsed two white candidates, Elizabeth Howell, wife of former Lieutenant Governor Henry E. Howell, Jr., and Claude J. Staylor, Jr., former Norfolk Chief of Police. The organization also endorsed a black candidate, Lenious G. Bond. Three other black candidates were amongst the field of twenty-one candidates, including Dr. Milton A. Reid, a plaintiff in this action. Dr. Reid sought, but did not receive, the Concerned Citizens' endorsement. Mrs. Howell received over 58% of the black vote[6] and Mr. Staylor received over 56% of the black vote and both were elected. Mr. Bond received 73% of the black vote, while Dr. Reid received only 36% of the black vote.

---

[6] The figures in this section are all based on homogeneous precinct analysis.

In 1980, the Concerned Citizens again endorsed Mrs. Howell. The organization also endorsed one black candidate, Mrs. Evelyn T. Butts, the co-director of the group. The only other black candidate in the field of twelve was George H. Banks, a plaintiff in this lawsuit. Mr. Banks was not endorsed by the Concerned Citizens, and received only 34.5% of the black vote. The endorsed candidates, Mrs. Howell and Mrs. Butts, received 72.9% and 92.9% of the black vote, respectively.

In the 1982 election, there were four black candidates in the field of fourteen. The Concerned Citizens endorsed two of the black candidates, Rev. Joseph N. Green, Jr. and Mrs. Butts. The two other black candidates, Herbert M. Collins, a plaintiff in this action, and James F. Gay, counsel for the plaintiffs, were not endorsed. Mr. Collins and Mr. Gay each received less than one-third of the black vote, whereas Rev. Green and Mrs. Butts each received over 87% of the black vote.

The Concerned Citizens endorsed two black candidates, Rev. John Foster and Mrs. Butts, and one white candidate, Joseph Leafe, in the 1984 election. Two black candidates who ran without the Concerned Citizens' endorsement, Theodore Hall and Joseph Rose, received 8.9% and 18.7% of the black vote, respectively. Mr. Leafe, who received only 1.7% of the black vote in 1980 when he ran without the Concerned Citizens endorsement, received 19.6% of the black vote in 1984, more than either Hall or Rose. Mrs. Butts received 72.1% of the black vote and Rev. Foster received 79.9%.

The plaintiffs have acknowledged the effectiveness of the Concerned Citizens' endorsements. In addition, the group's effectiveness is demonstrated by their success rate. From 1978 through 1984, the Concerned Citizens has endorsed twenty-one candidates, both black and white, for the Norfolk City Council. Thirteen of those candidates, five black and eight white, have been elected. From 1970 to

the present, the City Council has included at least two, and sometimes three, members who were endorsed by the Concerned Citizens, and who received a majority of the black vote. Six of the seven current Council members were endorsed by the Concerned Citizens in at least one of their campaigns.[7]

2. The City Democratic Party

The parties agree that Norfolk's black citizens generally support Democratic candidates in partisan elections. Approximately 31% of the Norfolk City Democratic Committee members are black. Two of the Committee's six officers, the first vice-chairman and the treasurer, are black.

There have been close ties, historically, between the black members of the City Democratic Committee and the leaders of the Concerned Citizens of Norfolk. In 1981 and 1982, however, a rift occurred in the City Democratic Committee which was related to the 1982 City Council campaign and involved several of the plaintiffs in this action.

In the fall of 1981, an election of precinct committee members was scheduled, but Party Chairman William P. Williams failed to notify Mrs. Butts, co-director of the Concerned Citizens, of the filing deadlines, as had been done customarily by past party chairmen. As a result, many persons who had previously served as precinct committee members missed the filing deadline and consequently were replaced. Approximately one-half of the precinct committee members were replaced by new precinct committee members. Herbert M. Collins, a plaintiff in this action, was among the new precinct committeemen. Mrs. Butts challenged the election in a December, 1981

---

[7] The Council members and their year/s of endorsement are as follows: Dr. Mason C. Andrews (1978), Rev. John Foster (1984), Rev. Joseph N. Green, Jr. (1978, 1982), Elizabeth Howell (1974, 1978, 1980), Joseph Leafe (1984) and Claude J. Staylor, Jr. (1974).

meeting of the Committee, charging that it should be voided for failure to provide proper notice.

In the spring of 1982, the newly constituted City Democratic Committee endorsed four of its members for City Council seats, this being the first time the Democratic Committee had ever endorsed City Council candidates. The Democratic ticket consisted of William P. Williams, party chairman, James F. Gay, counsel for the plaintiffs in this action, Herbert M. Collins, a plaintiff in this lawsuit, and Carolyn Papafil. Gay and Collins are black, while Papafil and Williams are white.

The Concerned Citizens endorsed Rev. Green and Mrs. Butts in the 1982 race, while plaintiff Dr. Milton Reid, publisher of the *Journal and Guide* newspaper, endorsed Collins and Gay. There was animosity between the Concerned Citizens and supporters of the Democratic ticket during the campaign. Rev. Green and Mrs. Butts each received over 87% of the black vote, while Gay and Collins each received less than one-third of the black vote.

In September, 1982, a petition was filed with the Second District Democratic Committee seeking new elections to the City Democratic Committee. An adversary hearing was eventually held before a representative of the State Democratic Party, in which James F. Gay, counsel for the plaintiffs in this action, represented the then current members of the City Committee and Delegate William P. Robinson, Jr., represented the then former Committee members. The hearing officer recommended that new elections be held.

The City Democratic Committee did not hold new elections, despite the hearing officer's recommendation. In 1983, the members of the Committee who had been displaced in 1981 organized a mass meeting of Norfolk's Democrats and elected new Committee members in an at-large election. According to Delegate Robinson, the decision to

hold the mass meeting was "purely politics," without any racial connotations. (Tr. 1687).

Included amongst those precinct committee members who lost their positions at the 1983 mass meeting were plaintiffs Herbert M. Collins, Dr. H. Marks S. Richard, Barbara C. Parham and counsel for the plaintiffs, James F. Gay. Subsequently, Mr. Gay filed a complaint with the Department of Justice, complaining about the reorganization of the City Democratic Committee. The Justice Department ultimately concluded that it did not have jurisdiction of the matter under Section 5 of the Voting Rights Act.

3. Summary

The Court concludes that blacks have played an active role in the City's political processes, particularly through the Concerned Citizens and the City Democratic Committee. Moreover, at least one black candidate has run in every City Council election since 1964. The Court concurs with the opinions expressed by Mrs. Evelyn T. Butts, Lt. Gov. Henry E. Howell, Jr., Judge Joseph A. Jordan, Jr., Delegate William P. Robinson, Jr., and former Delegate Robert Washington, all leading politicians, that blacks have the opportunity to participate in the City's electoral processes equally with whites, and have in fact done so. All of these long-time observers of, and participants in, City politics favor retention of the at-large electoral system. The Court gives their opinions great weight.

While the defendants contend that this lawsuit is in reality a case of the "ins" versus the "outs," as a result of past confrontations between the plaintiffs and the Concerned Citizens of Norfolk over endorsements and control of the City Democratic Committee, the Court finds it unnecessary in deciding the issues in this action to enter such a thicket or to make such a finding.

III. CONCLUSIONS OF LAW

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. § 1973j(f).

Having already set forth the applicable law earlier in this opinion, the Court will now consider the plaintiffs' statutory and constitutional claims.

A. Statutory Claim Under Section 2 of the Voting Rights Act

1. The Objective Factors

a. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.

The law is clear that the existence of past discrimination in the areas of registration, voting and political participation is significant only if it can be shown to have lingering effects on the ability of blacks to participate in the democratic process today. *See Zimmer* v. *McKeithen*, 485 F.2d at 1305-06; *see also United States* v. *Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir. 1984). The Court has found that although there is a past history of official discrimination in Virginia effecting the right of blacks to participate in the electoral process, there are no lingering effects of that discrimination which prevent Norfolk's black citizens from participating in the electoral process today. Norfolk's black citizens register to vote and turn out to vote at rates equal to or greater than that of Norfolk's white citizens when measured as a percentage of voting age population.[8] At least one black candidate has

---

[8] Contrast this to the findings of the three judge court in *Gingles* v. *Edmisten*, No. 81-803-CIV-5 (E.D.N.C. January 27, 1984). In that case, the court found a substantial disparity of 14% between black and white voter registration rates, with whites registering at the greater rate. Slip op. at 29.

run in every Norfolk City Council election since 1964. Blacks also participate in the political process through the Concerned Citizens of Norfolk and the City Democratic Party. The plaintiffs have failed to prove that the past history of official discrimination in Virginia with regard to black participation in the electoral process has left any lingering effects on the ability of Norfolk's black citizens to participate in the electoral process today.

b. The extent to which voting in the elections of the state or political subdivision is racially polarized.

The Court has adopted the definition of racial polarization offered by the defendants' expert Dr. O'Rourke as one which is supported by common sense, as well as the law. *See, e.g., United States* v. *Dallas County Commission*, 548 F. Supp. 875, 887 (S.D. Ala. 1982) (considering white backlash in addition to voting patterns). The Court has found few courts which have actually considered what is an appropriate definition of "racially polarized voting." Courts have, however, looked beyond the statistics offered by the parties, as this Court has done, in determining whether an electorate is racially polarized. *See, e.g., Terrazas* v. *Clements*, 581 F. Supp. 1329, 1353 (N.D. Tex. 1984) (considering financing, endorsements, and incumbency). The Court concludes that under the definition of racially polarized voting which it has adopted, the Norfolk electorate is not racially polarized.

c. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

(i.) Unusually Large Election Districts

Unusually large election districts are considered to have discriminatory effects because they may make it "more dif-

ficult for blacks to get to polling places or to campaign for office." *Rogers* v. *Lodge*, 458 U.S. 613, 627 (1982). In that case, the Supreme Court was considering an election district consisting of Burke County, Georgia, which was 831 square miles, the equivalent of two-thirds of the State of Rhode Island. *Id.* In comparison, Norfolk is only fifty-three square miles. The Court has found that Norfolk is not an unusually large election district and therefore this so-called enhancing factor does not apply.

(ii.) Majority Vote Requirements, Anti-Single-Shot Provisions or Numbered Post Provisions

A majority vote requirement may impede the ability of black candidates to win in a city in which they constitute a minority of the population. *See Gingles* v. *Edmisten*, slip. op. at 37. There is no majority vote requirement in Norfolk's electoral system.

An anti-single-shot provision may disadvantage minority voters because it "may force them to vote for nonminority candidates." *Nevett* v. *Sides*, 571 F.2d 209, 217 n.10 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980). There is no anti-single-shot rule governing Norfolk City Council elections.

A numbered post provision may disadvantage minority voters "by causing minority candidates to run in head-to-head contests against majority candidates." *Id.* There is no numbered post provision in Norfolk's electoral system.

(iii.) Staggered Terms

Staggered terms are considered to be a discriminatory device because they are thought to create more head-to-head racial contests. *See City of Rome* v. *United States*, 446 U.S. 156, 185 n.21 (1980); *Jones* v. *City of Lubbock*, 727 F.2d 364, 383 (1984). The Court has found, however, that this does not occur in Norfolk City Council elections because of the large field of candidates in every election.

(iv.) Lack of a District Residency Requirement

The courts are divided on the issue of whether district residency requirements enhance or weaken black voting strength. *Compare Rogers* v. *Lodge*, 458 U.S. at 627 (lack of district residency requirement enhances discrimination) *with Perkins* v. *City of West Helena*, 675 F.2d 201, 212 (8th Cir. 1982) (ward residency requirement enhances discrimination), *aff'd*, 459 U.S. 801 (1982). The lack of a ward residency requirement has not been shown by the evidence to enhance the opportunity for discrimination in Norfolk City Council elections.

(v.) Summary

The Court concludes that Norfolk's electoral system is free of any devices which enhance the opportunity for discrimination against the City's black citizens.

d. If there is a candidate slating process, whether the members of the minority group have been denied access to that process.

White v. *Regester*, 412 U.S. 755, 766-67 (1973), and its progeny clarify what is meant by this factor. *See, e.g., McIntosh County Branch of the NAACP* v. *City of Darien*, 605 F.2d 753, 758 (5th Cir. 1979). What the courts are concerned about is whether a small group of whites, acting as a formal or informal slating organization, effectively limits the ability of blacks to seek electoral office by excluding black candidates from its slating process. *See id.* The courts have considered to be relevant evidence that potential black candidates have been deterred from seeking electoral office because of fears of economic or other forms of reprisals from the members of the white slating group. *See id.*

The Court has found that there is no group of white Norfolk citizens who, acting as a formal or informal slating organization, controls access to the ballot. Moreover, the plaintiffs presented no evidence that any potential black

candidate had ever been dissuaded from seeking election by fear of reprisals from any members of the white community. The Court has found that the plaintiffs' contention that a white westside businessmen's coalition acted as a slating organization in the 1976 and 1980 elections is not supported by the evidence. The Court has further found that the only possible instance of slating which has occurred in Norfolk City Council elections was the City Democratic Party's support of a biracial ticket of four candidates in the 1982 election. The Court concludes that there is no candidate slating process in Norfolk and therefore Norfolk's black citizens have not been denied access to such a process.

e. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.

Congress explained its interpretation of this factor as follows:

> The Courts have recognized that disproportionate educational[,] employment, income level[,] and living conditions arising from past discrimination tend to depress minority political participation .... Where these conditions are shown, *and where the level of black participation is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.114, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207 (emphasis added); *see Major* v. *Treen*, 574 F. Supp. 325, 351 n.31 (E.D. La. 1983). In other words, if the socio-economic statistics show a disparity between black and white residents

and the level of black political participation is less than that of whites, the plaintiffs need not show a causal nexus between the two conditions. *See United States* v. *Marengo County Commission*, 731 F.2d at 1569.

In the present case, the Court has found a disparity between Norfolk's black and white citizens based upon the socio-economic statistics in such areas as education, income, and housing conditions. The Court has found, however, that the level of black political participation in Norfolk is equal to or greater than that of the City's white citizens, as measured by voter registration and voter turnout based upon a percentage of the voting age population, two measures which the courts have used to measure minority political participation. *See, e.g., id.* at 1568. The Court concludes that whatever socio-economic disparities exist between Norfolk's black and white residents, they do not hinder the ability of blacks to participate effectively in the City's political process today.

f. Whether political campaigns have been characterized by overt or subtle racial appeals.

In considering this factor, the courts have usually looked for a "general pattern of racial appeals in campaigns." *Gingles* v. *Edmisten*, slip op. at 39. In this case, the plaintiffs have alleged that only one campaign, the 1982 City Council election, was marred by racial appeals. They point primarily to the discussion of public school busing by those candidates who favored or opposed a plan by the Norfolk School Board to reduce the busing of elementary school pupils.

The Court has found that the discussion of busing during the 1982 campaign was not an appeal to racial prejudices. The issue was a matter of legitimate public concern and was raised by both black and white candidates. There was no effort by the plaintiffs to show a history or general pattern of racial appeals in Norfolk City Council elections and the Court concludes that none exists.

g. The extent to which members of the minority group have been elected to public office in the jurisdiction.

It is clear, as the Court pointed out earlier in this opinion, that no group has a constitutional right to proportional representation. *See Whitcomb* v. *Chavis*, 403 U.S. 124, 156-57 (1971); *Terrazas* v. *Clements*, 581 F. Supp. 1329, 1341 (1984). Congress explained the consideration which should be given to this factor as follows:

> The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote" in violation of this section. *Zimmer*, 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section, e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution . . . Instead, we shall continue to require an independent consideration of the record." *Id.*

S. Rep. No. 417, 97th Cong.,2nd Sess. 29 n.115, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 207.

The Court has conducted an independent review of the record, and contrary to the plaintiffs' claims, has found no evidence of an attempt by Norfolk's white citizens to circumvent the Constitution by manipulating the election of a "safe" minority candidate. The Court further found that a black has been elected to the City Council in every election since 1968, and that the Council currently has two black members. In addition to black membership on the Council, white candidates who have been the choice of a

majority of the black electorate have been elected to the Council consistently over the years. Moreover, the Court has found that blacks have been elected to the City's delegation to the Virginia House of Delegates and to a City constitutional office in at-large elections. The Court concludes that blacks and candidates of choice of the black community have been elected to public office in Norfolk.

h. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

While the issue of responsiveness is not a necessary part of the plaintiffs' case, the plaintiffs' have chosen to offer such evidence and the defendants have accordingly offered rebuttal evidence. *See* S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.116, 1982 U.S. Code Cong. & Ad News 177, 207. The Fourth Circuit has stated that the concept of "unresponsiveness" contemplates:

> a degree of unresponsiveness to the needs and interests of the black minority so palpable that it compels - or even fairly supports - an inference that the minority's "voting potential" has been so effectively "cancelled out" that its residual "political strength" is presently being disregarded with confident impunity by the city's governing body.

Washington v. *Finlay*, 664 F.2d 913, 923 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). In that case, the Fourth Circuit upheld the district court's finding that the city had been responsive, stating:

> Support for this ultimate finding was found in employment figures showing substantial black employment in city jobs, in significant though concededly not proportional black representation in appointive offices and supervisory positions, in

> the heavy allocation of federal block grant development funds to the black community, and in the substantially equal provision of essential services and improvements to black residential neighborhoods.

Id. at 922.

The Court concludes that the plaintiffs raised a number of issues with regard to responsiveness, but that the evidence offered by the defendants rebuts the plaintiffs' allegations of unresponsiveness. The Court has found evidence of substantial black employment in City jobs, significant black representation on appointive boards and commissions, considerable expenditures of federal and local funds in black-occupied areas, and a nondiscriminatory provision of essential City services and capital improvements to black residential neighborhoods.

i. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The Court is to consider whether the City's use of the challenged election procedure "markedly departs from past practices or from practices elsewhere in the jurisdiction . . . ." S. Rep. No. 417, 97th Cong., 2nd Sess. 29 n.117, *reprinted in* 1982 U.S. Code Cong. & Ad. News 207. The Court has found that Norfolk's at-large system for the election of City Council members has been in effect continuously since 1918. The Court has further found that Norfolk's at-large system of electing City Council members is consistent with the practices of an overwhelming majority of Virginia's cities, as well as with the practices nationwide of cities with council-manager forms of government. The Court concludes that the policy underlying the use of the at-large system is not tenuous.

2. The Totality of the Circumstances

The Court has already established the proper legal standard to be applied in this case with regard to the Section 2 claim, that is, whether, based on the totality of circumstances, the plaintiffs have shown that the political processes leading to the election of the members of the Norfolk City Council are not equally open to participation by the black citizens of Norfolk, in that they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The Court has considered thoroughly the lengthy testimony and extensive documentary evidence in this case. The Court concludes, based on the totality of circumstances, that the plaintiffs have failed to prove that the political processes leading to the election of the members of the Norfolk City Council are not equally open to participation by the black citizens of Norfolk. The Court is convinced that Norfolk's black citizens have an opportunity equal to that of other members of the electorate to participate in the electoral process and to elect representatives of their choice.

B. Statutory Claim Under 42 U.S.C. § 1983

The Court concludes that the plaintiffs have failed to show that any citizen has been deprived of his or her right to vote on account of his or her race as a result of Norfolk's at-large electoral system. The plaintiffs presented no evidence that, for example, a qualified black citizen was prevented from registering to vote or from actually voting.

C. Constitutional Claims

The Court has previously set out the appropriate legal standard to be applied in this case with regard to the constitutional claims, that is, whether the plaintiffs have shown that the at-large system was adopted and has been maintained with the intent of discriminating against the black citizens of Norfolk. Discriminatory intent need not

be proven by direct evidence, but may be "inferred from the totality of the relevant facts." *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). Furthermore, racial discrimination "need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the fourteenth and fifteenth amendments to occur." *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984); *see Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).

The plaintiffs presented no direct evidence that the at-large system was adopted for a discriminatory purpose. The plaintiffs urge the Court to infer from a series of newpaper articles and advertisements which appeared just days before the referendum on the charter change in 1917 that the proponents of the at-large system had racially discriminatory motives. The Court finds exactly the opposite to be true. It was the opponents of the at-large system who injected the issue of race into the public debate over the charter change just days before the referendum. Supporters of the at-large system contended that race was not an issue and that the opponents of the charter change were trying to sway voters by injecting an irrelevant issue into the public debate. The Court concludes that the plaintiffs have failed to prove, either by direct or circumstantial evidence, that the at-large system was adopted for a racially discriminatory purpose. Likewise, the Court concludes that the at-large system has not been maintained for the purpose of discriminating against Norfolk's black citizens. In reaching these conclusions, the Court has considered all of the evidence submitted by the plaintiffs in support of their Section 2 claim.

IV. CONCLUSION

On the basis of the foregoing findings of fact and conclusions of law, the Court holds that Norfolk's at-large system for the election of City Council members does not

violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1983, or the United States Constitution. Accordingly, the Clerk is DIRECTED to enter judgment in favor of the defendants, and against the plaintiffs, on all claims.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

July 19, 1984
Norfolk, Virginia

APPENDIX G

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 88-3950

HERBERT M. COLLINS; H. MARKS S. RICHARD; BARBARA C. PARHAM; WILLIAM E. SWINDELL, JR.; MILTON A. REID, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NORFOLK BRANCH; GEORGE BANKS; JULIAN HAZEL

Plaintiffs - Appellants

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; MASON C. ANDREWS; JOSEPH A. LEAFE; JOSEPH N. GREEN, JR.; CLAUDE J. STAYLOR, JR.; ROBERT E. SUMMERS; ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM; MARTHA H. BOONE; PAUL M. LIPKIN, members of the City of Norfolk Electoral Board; VINCENT J. THOMAS, Mayor of the City of Norfolk

Defendants - Appellees

FILED

AUG 18 1989

U.S. Court of Appeals
Fourth Court

APPEAL FROM the United States District Court for the Eastern District of Virginia, at Norfolk.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, at Norfolk, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed and remanded.

/s/ John M. Greacen
CLERK

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3950

HERBERT M. COLLINS; H. MARKS S. RICHARD; BARBARA C. PARHAM; WILLIAM E. SWINDELL, JR.; MILTON A. REID; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NORFOLK BRANCH; GEORGE BANKS; JULIAN HAZEL

Plaintiffs - Appellants

v.

CITY OF NORFOLK, VIRGINIA, a municipal corporation; MASON C. ANDREWS; JOSEPH A. LEAFE; JOSEPH N. GREEN, JR.; CLAUDE J., JR.; ROBERT E. SUMMERS; ELIZABETH M. HOWELL, members of the Norfolk City Council; CITY OF NORFOLK ELECTORAL BOARD; PAUL D. FRAIM; MARTHA H. BOONE, PAUL M. LIPKIN, members of the City of Norfolk Electoral Board; VINCENT J. THOMAS, Mayor of the City of Norfolk

Defendants - Appellees

FILED

OCT 3 1989

U.S. Court of Appeals
Fourth Court

CORRECTED ORDER

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this court. In a requested poll of the court, Judges Russell, Widener, Hall, Chapman, and Wilkins voted to rehear the case in banc. Chief Judge Ervin and Judges Winter, Phillips, Murnaghan, and Sprouse voted against rehearing in banc. Judge Wilkinson disqualified himself from participation in the poll. Senior Judge Butzner did not vote on the petition for rehearing in banc. A majority of the judges who are in active service did not vote to grant rehearing in banc, and

The panel considered the petition for rehearing and is of the opinion that it should be denied. Judge Chapman dissents from the order denying rehearing by the panel.

IT IS ADJUDGED AND ORDERED that the petition for rehearing by the panel and the petition for rehearing in banc are denied.

The motion to stay the mandate is granted pending the timely filing of a petition for certiorari and action on the petition by the Supreme Court.

Entered at the direction of Senior Judge Butzner.

FOR THE COURT - BY DIRECTION

CLERK

APPENDIX I

VOTING RIGHTS ACT

§ 1973. * * * *

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b (f) (2) of this title, as provided in subsection (b) of this Section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

APPENDIX J

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court

(a) Effect. [Effective until August 1, 1985. See, also, subdivision (a) below.] In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(a) Effect. [Effective on August 1, 1985. See, also, subdivision (a) above.] In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * * *

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3950

Herbert M. Collins, et al,
Plaintiffs - Appellants,

v.

City of Norfolk, et al,
Defendants - Appellees.

FILED

DEC 6 1988

U.S. Court of Appeals
Fourth Circuit

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Upon consideration of appellees' motion to file brief with addendum and appellants' response to the motion,

IT IS ORDERED that appellees' motion to file brief with addendum is granted.

For the Court

/s/ JOHN M. GREACEN
CLERK

APPENDIX L
ABSTRACT OF NORFOLK CITY COUNCIL ELECTION—May 10, 1988

COUNTY/CITY RESULTS SHEET

COMMONWEALTH OF VIRGINIA
CITY COUNCIL ELECTION
MAY 10, 1988

NORFOLK
COUNTY/CITY

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 1 of 6	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
001 CAMPOSTELLA MIDDLE SCHOOL				6	396	187	171	0	43	285	40	45	180/27	460
002 BERKLEY RECREATION CENTER				8	275	131	167	1	32	259	38	31	225/66	411
003 CHESTERFIELD MGT ELEMENTARY SCHOOL				8	196	143	114	1	17	146	30	14	90/39	266
004 BOWLING PARK ELEMENTARY SCHOOL				19	427	282	271	4	73	257	154	24	246/123	627
005 BRAMBLETON MULTI PURPOSE CENTER				5	132	79	82	0	8	105	17	5	73/9	171
006 UNION CHAPEL A M E CHURCH				7	215	149	139	5	15	115	40	19	73/24	267
007 LINDERWOOD ELEMENTARY SCHOOL				8	188	142	121	2	24	157	54	23	138/27	298
008 YOUNG PARK ELEMENTARY SCHOOL				5	392	285	242	2	70	348	115	73	176/72	593
009 HUNION YMCA				0	80	50	48	0	24	60	21	22	61/33	133

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 2 of 6	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
010 MUNICIPAL AUDITORIUM				12	97	108	106	8	8	10	4	3	37/3	133
011 OHEF SHOLOM TEMPLE				13	119	118	132	2	6	10	4	1	33/3	147
012 ST ANDREW'S EPISCOPAL CHURCH				23	257	288	307	12	12	28	7	8	83/3	344
013 MAURY HIGH SCHOOL				17	151	167	184	11	22	22	10	9	70/3	222
014 PARK PLACE MULTI-PURPOSE CENTER				11	268	215	197	3	29	102	51	30	63/24	331
015 STUART SCHOOL RECREATION CENTER				17	219	202	191	9	18	89	16	7	63/6	279
016 BLESSED SACRAMENT SCHOOL				13	186	184	143	8	24	76	18	16	80/54	261
017 ROSE OF SHARON MISS BAPTIST CHURCH				11	150	126	64	2	66	92	21	11	61/24	210
018 CANTERBURY CENTER				18	188	205	222	4	7	10	4	3	82/6	243
019 LARCHMONT LIBRARY PUBLIC MEETING ROOM				12	179	195	208	4	7	10	2	1	44/6	223
020 LARCHMONT SCHOOL RECREATION ROOM				23	204	235	250	4	9	17	5	2	58/6	271
021 ZION GRACE UNITED METHODIST CHURCH				42	354	405	402	7	20	50	14	8	165/3	491

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 3 of 8	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
022 GRANBY ELEMENTARY SCHOOL				42	210	211	215	14	23	98	13	11	116/18	323
023 GRANBY HIGH SCHOOL				23	214	242	263	11	9	20	9	8	78/8	295
024 SUBURBAN PARK ELEMENTARY SCHOOL				30	200	238	239	10	11	55	12	5	101/15	304
026 LAKEWOOD RECREATION CENTER				37	353	327	338	16	29	150	86	14	158/36	509
027 WILLARD ELEMENTARY SCHOOL				22	184	168	175	6	18	43	20	13	49/9	229
028 LAFAYETTE PRESBYTERIAN CHURCH				18	145	149	147	4	14	59	20	11	62/15	215
029 BALLENTINE ELEMENTARY SCHOOL				8	148	138	133	5	33	67	22	14	47/30	215
030 INGLESIDE RECREATION CENTER				28	243	202	211	4	39	148	42	18	79/24	345
031 POPLAR HALLS ELEMENTARY SCHOOL				17	288	239	247	8	55	180	31	24	108/39	405
032 EASTON ELEMENTARY SCHOOL				30	155	158	165	9	24	48	12	5	58/9	223
033 FAIRLAWN RECREATION CENTER				40	85	124	117	12	10	28	18	11	48/0	183

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 4 of 6	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
034 W W HOUSTON BOY'S CLUB				18	59	66	66	4	5	29	3	4	34/0	97
035 COLEMAN PLACE PRESBYTERIAN CHURCH				28	71	87	81	4	12	21	17	8	12/0	113
036 COLEMAN PLACE ELEMENTARY SCHOOL				7	61	62	58	7	7	23	11	4	26/3	90
037 SHERWOOD FOREST ELEMENTARY SCHOOL				31	65	92	101	5	14	20	8	5	19/8	122
038 SHERWOOD FOREST COMMUNITY CENTER				32	114	135	130	12	14	26	11	8	25/0	169
039 NORVIEW UNITED METHODIST CHURCH				94	191	208	215	18	18	94	21	19	117/45	347
040 BARRON F BLACK BRANCH LIBRARY				44	170	184	181	13	12	84	29	15	89/15	282
041 AZALEA GARDEN MIDDLE SCHOOL				23	141	148	170	7	4	17	7	5	39/0	187
042 ROSEMONT MIDDLE SCHOOL				10	395	270	268	1	40	279	108	23	276/84	588
043 WESLEY MEMORIAL UNITED METH. CHURCH				12	53	64	62	0	3	1	3	5		78
044 CROSSROADS RECREATION CENTER				46	88	119	122	18	10	33	16	11	52/3	172

	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 5 of 6	
PRECINCT NUMBER AND NAME	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
045 MARY CALCOTT ARTS & CRAFTS CENTER				10	65	73	79	8	0	10	2	2	19/3	91
046 TARNALLTON RECREATION CENTER				83	132	216	207	17	19	39	19	7	84/0	275
047 LARRYMORE ELEMENTARY SCHOOL				35	215	220	236	11	18	47	23	113	47/6	280
048 LITTLE CREEK SCH RECREATION CENTER				52	115	154	153	13	20	23	9	7	24/0	190
049 E OCEAN VIEW RECREATION CENTER				13	46	51	53	4	5	8	8	4	7/0	65
050 BAYVIEW ELEMENTARY SCHOOL				96	211	300	326	32	16	57	38	20	125/3	410
051 BAYVIEW UNITED CHURCH OF CHRIST				53	129	162	156	15	9	17	15	7	46/3	204
052 NORTHSIDE MIDDLE SCHOOL				58	188	236	254	32	19	31	10	8	78/3	299
053 OCEANAIR ELEMENTARY SCHOOL				31	123	139	139	11	12	31	13	10	31/3	181
054 OCEAN VIEW RECREATION CENTER				17	84	106	114	10	9	13	7	4	50/3	139

PRECINCT NUMBER AND NAME	NUMBER VOTING FROM POLL BOOKS SECTION ON STATEMENT OF RESULTS			CITY COUNCIL CANDIDATES									Page 6 of 6	
	IN PERSON	ABSENTEE	TOTAL	LUTHER ARMSTRONG	JOHN FOSTER	ELIZABETH HOWELL	JOSEPH LEAFE	ERIC MAGNER	PERCY PEELE	PAUL RIDDICK	JOSEPH ROSE	JUNIUS THOMPSON	U/O	TOTAL VOTES
055 OCEAN VIEW ELEMENTARY SCHOOL				37	198	227	233	37	15	22	10	8	44/5	278
056 ABSENTEE VOTING PRECINCT - CITY HALL				46	143	168	178	11	19	181	28	14	272/3	347
TOTALS				1,443	9,925	9,557	9,610	482	1,097	4,198	1,342	696		14,619

WRITE-INS

	NO. OF VOTES	PRECINCT
CHRISTOPHER STEVEN DAVIS	1	28
DAVID R. HAHN	1	50
JULIAN HIRST	2	23
GARY DAVID MILLER	1	50
EARL V. SWIFT	2	10,12
GEORGE R. VAUGH[illegible]	1	34
BRUCE WILCOX	1	45
NANCY WILCOX	1	45
BOB WILSON	1	50
RANDY WRIGHT	3	26,30,46
	14	

207a

APPENDIX M

DEFENDANTS' EXHIBIT NO. 470

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1984 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in		
	Candidate (B = Black) #	Homogeneous Black Precincts (N = 10)	Homogeneous White Precincts (N = 12)	Entire City (Total Votes) +
	Anders, Alvin	1.1	7.9	5.0 (1,701)
	Armstrong, Luther	2.1	20.7	14.3 (4,916)
	Butts, Evelyn (B)	72.1	24.2	46.9 (16,084)
ELECTED	Foster, John (B)	79.9	26.6	49.9 (17,134)
	Hall, Theodore (B)	8.9	3.0	6.7 (2,291)
ELECTED	[Howell, Elizabeth]	39.8	68.8	54.3 (18,641)
	Lass, Deborah	0.6	3.7	2.6 (882)
ELECTED	[Leafe, Joseph]	19.6	86.3	52.4 (17,967)
	Rose, Joseph (B)	18.7	3.3	10.2 (3,513)
	Schippell, H. R.	0.4	11.3	8.2 (2,824)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 54 precincts plus absentee ballots. The total number of voters casting ballots was 34,304.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1982 NORFOLK CITY COUNCIL ELECTIONS (FOUR SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 10)	(N = 10)	Entire City (Total Votes) +
ELECTED	[Andrews, Mason C.]	5.8	79.9	47.6 (17,728)
	Butts, Evelyn T. (B)	87.6	11.2	40.0 (14,876)
	Collins, Herbert M. (B)	27.5	2.6	12.8 (4,749)
	Conley, Lena Rosa K.	1.7	2.9	2.9 (1,079)
	Gay, James F. (B)	29.6	4.1	14.7 (5,488)
ELECTED	[Green, Jos. N., Jr.] (B)	88.2	31.1	50.1 (18,665)
	Jarvis, Patricia Anne	6.3	5.7	5.5 (2,054)
	Mottesheard, Shirley S.	0.5	8.6	6.0 (2,250)
	Papafil, Carolyn A.	6.6	8.7	10.1 (3,774)
	Ryan, William C.	0.9	41.1	21.0 (7,836)
	Schippell, H. R.	0.2	7.5	6.4 (2,400)
ELECTED	[Staylor, Claude J., Jr.]	1.6	75.3	49.0 (18,247)
ELECTED	[Summers, Robert E.]	2.1	72.1	45.5 (16,923)
	Williams, William R.	8.7	12.3	13.2 (4,929)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 52 precincts plus absentee ballots. The total number of voters casting ballots was 37,234.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1980 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in		
	Candidate (B = Black) #	Homogeneous Black Precincts (N = 10)	Homogeneous White Precincts (N = 10)	Entire City (Total Votes) +
	Banks, George H. (B)	34.5	2.3	12.0 (3,449)
	Barco, Herman J.	1.5	3.8	3.2 (930)
	Butts, Evelyn T. (B)	92.9	9.5	39.7 (11,380)
	Conley, Lena Rosa K.	1.2	5.1	4.4 (1,257)
	Hellinger, Joseph W.	5.1	8.8	7.4 (2,114)
ELECTED	[Howell, Elizabeth M.]	72.9	31.7	47.6 (13,637)
ELECTED	Leafe, Joseph A.	1.7	68.1	41.2 (11,785)
	Mottesheard, Shirley S.	0.9	12.2	9.9 (2,840)
	Phillips, G. Conoly	2.7	56.3	36.0 (10,312)
	Sykes, A. Winston	1.0	13.2	11.1 (3,184)
ELECTED	[Thomas, Vincent J.]	4.1	71.3	44.7 (12,795)
	Trice, P.D., Jr.	0.4	2.9	2.6 (753)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 52 precincts plus absentee ballots. The total number of voters casting ballots was 28,638.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1978 NORFOLK CITY COUNCIL ELECTIONS (FIVE SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	Entire City
	Candidate (B = Black) #	(N = 10)	(N = 11)	(Total Votes) +
ELECTED	[Andrews, Mason C.]	43.5	72.2	59.8 (19,483)
	Coneys, John Joseph	4.1	13.7	11.6 (3,794)
	Conley, Lena Rosa K.	3.1	5.6	5.6 (1,826)
	Copeland, Howard E.	45.0	32.0	35.8 (11,683)
ELECTED	[Green, Jos. N., Jr.] (B)	96.1	32.2	51.5 (16,776)
	Hellinger, Joseph W.	15.0	12.6	13.9 (4,543)
ELECTED	[Howell, Elizabeth M.]	68.5	26.6	42.5 (13,843)
	Middleton, E. George, Jr.	3.3	64.1	41.5 (13,526)
ELECTED	[Staylor, Claude J., Jr.]	1.7	67.5	48.2 (15,708)
ELECTED	[Summers, Robert E.]	4.0	64.6	44.2 (14,403)
	White, Robert M.	42.8	40.5	40.9 (13,331)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 32,604.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1976 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in*		
	Candidate (B = Black) #	Homogeneous Black Precincts (N = 10)	Homogeneous White Precincts (N = 10)	Entire City (Total Votes) +
	Bond, Michael E.	0.2	6.8	4.9 (1,710)
	Conley, Lena Rosa K.	0.6	4.5	3.9 (1,641)
	Hellinger, Joseph W.	3.7	2.3	2.6 (1,104)
	[Hill, Irvine B.]	76.3	20.0	40.5 (17,183)
	[Hurst, R. Stanley]	75.6	21.7	41.5 (17,624)
ELECTED	[Jordan, Jos. A., Jr.] (B)	97.3	24.3	47.9 (20,332)
ELECTED	Phillips, G. Conoly	2.9	77.9	53.3 (22,609)
	Sams, Bruce (B)	5.4	1.4	2.8 (1,185)
	Scarangello, Anthony J.	0.4	13.8	11.9 (5,058)
ELECTED	Thomas, Vincent J.	1.6	79.0	52.1 (22,137)
	Wallace, Richard A.	0.4	2.2	1.8 (752)
	Wise, William Perry	--- WITHDREW ---		(4)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 42,456.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1974 NORFOLK CITY COUNCIL ELECTIONS (FOUR SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 7)	(N = 32)	Entire City (Total Votes) +
ELECTED	Andrews, Mason C.	16.7	58.0	49.3 (18,289)
	Baxter, William	1.0	2.5	2.2 (799)
	Blassingham, Mel. T., Jr.	0.9	23.2	18.8 (6,977)
	Bond, Lenious G. (B)	73.4	7.6	24.1 (8,956)
	Cuffey, Sonnie G. (B)	12.8	2.3	4.9 (1,818)
	Delamorton, Howard F. B.	0.7	0.8	0.7 (271)
	Dozier, Willie L., Sr. (B)	9.2	0.6	2.2 (808)
	Gulick, Richard I.	0.4	5.5	4.7 (1,731)
	Hellinger, Joseph W.	4.6	2.9	3.8 (1,411)
ELECTED	Howell, Elizabeth M.	58.2	38.2	41.9 (15,547)
	[Hughes, George S.]	1.1	40.8	31.7 (11,771)
	Lassiter, Arnold R.	1.9	18.3	13.1 (4,877)
	Mack, Roland	0.4	1.0	0.8 (295)
	Melchiorre, Peter M.	0.3	1.8	1.5 (564)
	Melchor, Bruce E., III	0.4	6.6	5.8 (2,170)
	Moss, Charles B.	1.4	12.9	10.4 (3,851)
	Nichols, Dorothy Sue S.	0.5	7.6	5.5 (2,035)
	Reid, Milton A. (B)	36.4	3.0	10.6 (3,946)
ELECTED	Staylor, Claude J., Jr.	56.5	66.8	63.5 (23,566)
ELECTED	[Summers, Robert E.]	7.6	51.1	40.2 (14,905)
	Wallace, Richard A.	1.1	19.6	15.2 (5,638)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 54 precincts plus absentee ballots. The total number of voters casting ballots was 37,105.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1972 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 7)	(N = 30)	Entire City (Total Votes) +
	Bell, Helen I.	1.2	9.1	6.8 (2,182)
	Byrum, Elwood W.	- - - WITHDREW - - -		(2)
	Conley, Lena Rosa K.	0.5	0.8	0.7 (238)
	Crank, Robert B.	0.3	1.2	0.8 (268)
	Hespenheide, Franz S.	0.8	3.1	2.5 (800)
ELECTED	Hill, Irvine B.	32.2	55.6	47.0 (15,104)
	[Hill, R. Braxton, Jr.]	10.0	44.6	34.6 (11,116)
ELECTED	[Hurst, R. Stanley]	35.6	59.0	50.7 (16,297)
ELECTED	[Jordan, Jos. A., Jr.] (B)	98.3	22.3	46.3 (14,867)
	Ogg, Kathryn	0.7	15.5	9.88 (3,149)
	Parsons, L. Shields, Jr.	6.1	39.8	30.3 (9,732)
	Shalhoup, Jewell B.	0.5	1.7	1.2 (394)
	Wallace, Richard B.	0.8	26.3	18.3 (5,891)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 32,120.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1970 NORFOLK CITY COUNCIL ELECTIONS (SIX SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 7)	(N = 30)	Entire City (Total Votes) +
	Capps, John W. (B)	13.9	3.7	6.6 (2,020)
	Conley, Mrs. George W.	0.8	2.7	2.2 (676)
	Gottlieb, Raymond	34.9	28.3	31.2 (9,535)
	Hanckel, Allan R.	33.7	25.3	28.5 (8,715)
ELECTED	Hill, R. Braxton	6.3	49.7	39.4 (12,062)
ELECTED	[Hughes, George R.]	8.1	63.2	49.1 (15,010)
ELECTED	Hurst, R. Stanley	40.8	43.2	41.9 (12,831)
	Kissinger, M. Theo., Jr.	31.2	10.6	16.5 (5,033)
	Mack, Roland	1.1	2.5	2.1 (629)
ELECTED	[Martin, Roy B.]	10.8	55.1	44.4 (13,572)
ELECTED	[Nusbaum, V. H.]	10.1	57.9	47.0 (14,377)
	Ogg, Kathryn N.	1.5	21.0	14.9 (4,549)
	Perry, Kenneth N.	5.7	46.2	36.5 (11,158)
	Scarangella, Anthony J.	0.8	17.2	11.3 (3,467)
	Sichta, Robert	26.5	8.2	13.9 (4,248)
ELECTED	[Summers, Robert E.]	5.5	66.8	50.2 (15,360)
	Walton, Roland J. (B)	92.4	14.0	36.4 (11,142)
	Wells, John S.	1.0	3.6	2.9 (899)
	Willis, Berry D., Jr.	6.4	28.0	21.4 (6,535)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 30,595.

PERCENTAGE OF VOTE RECEIVED BY CANDIDATES IN RACIALLY HOMOGENEOUS PRECINCTS* IN THE 1968 NORFOLK CITY COUNCIL ELECTIONS (THREE SEATS UP)

		Percent of Voters Voting for Candidate in		
		Homogeneous Black Precincts	Homogeneous White Precincts	
	Candidate (B = Black) #	(N = 7)	(N = 30)	Entire City (Total Votes) +
ELECTED	[Ballard, William P.]	3.5	70.0	48.1 (13,476)
ELECTED	[Barfield, Sam T.]	4.1	72.7	49.8 (13,942)
	Ellis, James T.	2.4	4.8	4.1 (1,157)
ELECTED	Jordan, Jos. A., Jr. (B)	91.9	28.7	48.4 (13,551)
	Lasky, Mortimer	1.3	7.7	6.1 (1,704)
	[Schweitzer, Paul]	4.9	63.7	44.7 (12,527)
	Warrick, Thomas D.	1.5	16.1	10.2 (2,857)
	Willis, Berry D., Jr.	28.9	32.1	28.0 (7,875)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

Incumbent councilors are designated by brackets.

+ The citywide percentage and vote total are based on the returns from 53 precincts plus absentee ballots. The total number of voters casting ballots was 38,024.

NOTE: DATA FOR THIS ELECTION ARE BASED ON NEWSPAPER REPORTS.

TABLE A

1986 NORFOLK CITY COUNCIL ELECTION RESULTS (FOUR SEATS UP)
PERCENTAGE OF VOTERS BY RACE SUPPORTING PARTICULAR CANDIDATES UNDER HOMOGENEOUS PRECINCT ANALYSIS* AND REGRESSION ANALYSIS

		Black Voters		White Voters		Entire City	
		Homogeneous (N = 10)	Regression (Unweighted) (N = 54)	Homogeneous (N = 12)	Regression (Unweighted) (N = 54)	Total Votes +	
Elected	[Andrews]	38.4	35.3	72.6	70.6	56.95	(17,552)
	Conley	2.3	2.6	5.0	6.8	4.74	(1,462)
	Dabu	6.3	6.1	10.2	13.4	9.87	(3,043)
Elected	Fraim	29.8	25.9	67.0	62.0	48.67	(15,001)
Elected	[Green] (B)	90.3	93.4	27.3	21.1	49.45	(15,242)
	Hailey	34.2	39.1	30.8	27.2	31.92	(9,839)
	Harris (B)	84.1	89.1	4.8	1.1	35.69	(10,999)
Elected	Phillips	29.3	32.7	50.3	51.8	44.03	(13,570)
	Schippell	2.7	3.1	3.9	5.9	4.65	(1,432)
	Wright	3.8	1.1	60.3	69.9	42.61	(13,133)

* A racially homogeneous precinct is defined as one in which the white or black voting age population is equal to or greater than 90.0 percent of the total voting age population of the precinct. Voting age population is defined as persons aged eighteen years and over.

+ The citywide percentage and vote total are based on the returns from 54 precincts plus absentee ballots. The total number of voters casting ballots was 30,821.

Incumbent councilors are designated by brackets.

(B) designates black candidates.

Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

BARBARA R. ARNWINE
FRANK R. PARKER *
BRENDA J. WRIGHT
ROBERT B. MCDUFF
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-1212

JAMES F. GAY
1317 East Brambleton Avenue
Norfolk, Virginia 23504
(804) 627-3100

* Counsel of Record

Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PROCEEDINGS	1
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	9
I. CONTRARY TO THE CITY'S ARGUMENT, THE COURT OF APPEALS DID NOT APPLY A PROPORTIONAL REPRESENTATION STANDARD	10
II. CONTRARY TO PETITIONERS' ARGUMENT, THE FOURTH CIRCUIT'S DEFINITION OF "REPRESENTATIVES OF CHOICE" IS COMPLETELY CONSISTENT WITH *GINGLES* AND THE DECISIONS OF OTHER COURTS OF APPEALS	13
III. CONTRARY TO PETITIONERS' ARGUMENT, THE COURT OF APPEALS CORRECTLY CONSIDERED BLACK ELECTORAL SUCCESSES AS "SPECIAL CIRCUMSTANCES" UNDER THIS COURT'S *GINGLES* DECISION	18
A. The Election of a Second Black Council Member After this Lawsuit Was Filed	18
B. The Repeated Reelection of Black Incumbents	20
CONCLUSION	22

TABLE OF AUTHORITIES

Cases *Page*

Brown v. Board of Commissioners of Chattanooga, 722 F. Supp. 380 (E.D. Tenn. 1989) 12
Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989) .. 15
Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1111 (1988) 20, 21
Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989) 15
Gingles v. Edmisten, 590 F. Supp. 345 (E.D. N.C. 1984) (three-judge court), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986) 12, 15, 18
Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1534 (1989) .. 12, 20, 21
Jackson v. Edgefield County, South Carolina, School District, 650 F. Supp. 1176 (D.S.C. 1986) 12
LULAC v. Midland Independent School District, 812 F.2d 1494 (5th Cir.), *vac'd on rehearing en banc, district court decision aff'd*, 829 F.2d 546 (5th Cir. 1987) (*en banc*) 12
Sanchez v. Bond, 875 F.2d 1488 (10th Cir. 1989), *cert. pending*, No. 89-353 15
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... 2, *passim*
Velasquez v. City of Abilene, 725 F.2d 1017 (5th Cir. 1984) 12
Windy Boy v. Big Horn County, 647 F. Supp. 1002 (D. Mont. 1986) 12
Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) 18

Statutes, Legislative History, and Rules

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982)	11
Rule 52(a), Federal Rules of Civil Procedure	19, 20
Rule 301, Federal Rules of Evidence	14
Other Authorities	
Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How. L. J. 495 (1985)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Herbert M. Collins, et al., seven black voters of the city of Norfolk, and the Norfolk Branch of the NAACP (who were plaintiffs below) respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Fourth Circuit's judgment in this case. The Fourth Circuit's opinion is reported at 883 F.2d 1232 (4th Cir. 1989).

PROCEEDINGS

This case was last before this Court in 1986, after the district court had rejected plaintiffs' challenge to at-large city council elections in Norfolk and the Fourth

Circuit had affirmed that decision, one judge dissenting. 605 F. Supp. 377 (E.D.Va. 1984) (*Collins I*), *aff'd*, 768 F.2d 572 (4th Cir. 1985) (*Collins II*).[1] On plaintiffs' petition, this Court vacated the Fourth Circuit's decision and remanded for further consideration in light of the intervening decision in *Thornburg v. Gingles*. *Collins v. City of Norfolk*, 478 U.S. 1016 (1986) (*Collins III*).

On remand, the Fourth Circuit reversed the district court's decision, set forth the proper legal standards under *Thornburg v. Gingles*, 478 U.S. 30 (1986), for evaluating the proof presented, and remanded the case back to the district court for further proceedings. 816 F.2d 932 (4th Cir. 1987) (*Collins IV*). Although petitioners now challenge the Fourth Circuit's rulings in *Collins IV*, they failed to contest that decision at the time by filing a petition for rehearing or petition for certiorari in this Court, in effect acquiescing in that decision.

The district court once again rendered judgment for the city, 679 F. Supp. 557 (E.D. Va. 1988) (*Collins V*), and the Fourth Circuit reversed because the district court failed properly to apply the standards of *Thornburg v. Gingles* and of the Fourth Circuit's previous opinion in *Collins IV*. 883 F.2d 1282 (4th Cir. 1989) (*Collins VI*).

At the outset, it is important to understand what is not involved in this petition for review. Contrary to the city's first argument (Pet., pp. i, 3, 15, 17-22), this case does not involve any issue of whether Section 2 of the Voting Rights Act is violated simply because blacks have not attained seats in proportion to their percentage in the population. In both decisions the Fourth Circuit expressly rejected any use of a proportional representation standard, *Collins IV*, 816 F.2d at 935 ("the lack of

---

[1] For an analysis of the early proceedings in this case, see Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 How. L. J. 495 (1985).

proportional representation alone does not establish a violation") (quoting *Thornburg v. Gingles*); *Collins VI*, 883 F.2d at 1243 ("But the complainants do not seek proportional representation, and the Act does not require it.").

Further, petitioners' second argument (Pet., pp. i, 23-26) rests on the completely untenable theory that in racially polarized elections in which black candidates preferred by over 70 percent and 90 percent of the black voters are defeated by white bloc voting, and white candidates with much less black support are elected instead, the white candidates who got the lower black vote percentages are the candidates of choice of the black voters. Until this case no court has ever embraced such a bizarre notion, the court of appeals properly reversed the district court on this issue, and there is no good reason why this issue requires the further attention of this Court.

STATEMENT OF THE CASE

Plaintiffs filed this lawsuit in 1983 challenging at-large city council elections in Norfolk, Virginia, for denying black voters an equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. As the court of appeals noted (883 F.2d at 1235), Virginia has an extensive past history of racial discrimination affecting the right to vote, including the use of the poll tax and the literacy test to prevent blacks from registering and voting. For this reason, Virginia was one of six Southern states covered by Sections 4 and 5 of the Voting Rights Act when the Act was passed in 1965, and the state remains covered by those provisions today. The effects of this past discrimination in voting continue to be perpetuated in black underrepresentation on the city council and severe racially polarized voting patterns.

Norfolk is 35 percent black in population, 31 percent black in voting age population, and 35 percent black in registered voters. The city has a council-manager form

of government with seven city council members all elected citywide to staggered four-year terms. Usually, every two years either three or four seats are up for election (more if there is a vacancy), and this means that voters have three or four votes (or more depending on the number of vacancies) to cast in each election.

From 1912, when at-large elections were adopted, to 1968 the Norfolk City Council was all-white, and from 1968 to 1984 the seven-member city council never had more than one black member. Black voters were unable to elect a second black council member until 1984, one year after this lawsuit was filed and three weeks before the scheduled trial, and then only as a result of unusual white support after the mayor publicly announced in a newspaper interview, "After the election, the issue of black representation may become a moot point" (816 F.2d at 938). Plaintiffs filed single-member district plans showing that if Norfolk were divided up into seven single-member districts, blacks would have voting age population majorities in *three* of the seven districts.[2]

There is no dispute in this case that Norfolk City Council elections are characterized by severe racially polarized voting, which this Court termed "a key element of a vote dilution claim." *Gingles*, 478 U.S. at 55. At the most recent oral argument in the district court, the city conceded that under the *Gingles* definition, there is racially polarized voting in city council elections: "There

[2] Ex. P-52. Plan 1 contains three majority black districts that are 64 percent, 62 percent, and 57 percent black in VAP; Plan 2 has three districts that are 63 percent, 62 percent, and 55 percent black in VAP. The district court concluded that blacks would constitute a majority in "no more than two of the proposed wards" by requiring that districts must be 65 percent black in population to meet the *Gingles* standard (679 F. Supp. at 566). However, this Court in *Gingles* only required proof that "the minority group must be sufficiently large and geographically compact to constitute *a majority* in a single-member district." 478 U.S. at 50 (emphasis added; footnote omitted).

are indeed high correlations between the race of the voter and the way that voter votes" (Tr. Oral Argument, Dec. 16, 1987, p. 41). Defendants' own statistics set out in the attached appendices[3] show patterns of racially polarized voting equal to or more severe than those before this Court in *Thornburg v. Gingles*. In every city council election white voters overwhelmingly vote for white candidates (see Appendix 1, attached), and black voters mostly prefer black candidates (see Appendix 2). In no instance has any black candidate gotten a majority of the white vote. Indeed, the highest white vote percentage that any black candidate has gotten is 32 percent (Appendix 2), as compared to white crossover voting of up to 40 and 50 percent in *Gingles* (478 U.S. at 59). As in *Gingles*, white voters almost always rank black candidates sixth or seventh in the multicandidate field (see Appendix 3; cf. 478 U.S. at 59, 61 and n.30).

As a result, in seven of the ten city council elections from 1968 to 1986 candidates who were overwhelmingly supported by black voters (receiving 70 percent or more of the votes of black voters) were defeated, while in every election white-preferred candidates always won and no candidate who received more than 70 percent of the white vote has ever been defeated (Appendix 3). The voting statistics also show that from 1970 to 1984 black voters consistently expressed a preference for a second black city council member, and black-preferred candidates for a second seat regularly were defeated by white candidates preferred by the white voters (*id.*).[4]

---

[3] The racial voting statistics used in this brief and appendices are the defendants' statistics, based on homogeneous precinct analysis, which were accepted by the district court (679 F. Supp. at 572) and the court of appeals.

[4] The city's statistics that 8 of 14 (and 7 of 13) black candidates who received a majority of the black votes were elected (Pet., pp. 3, 4) in actuality only means that from 1968 to 1984 the one black incumbent (Joseph Jordan from 1968 to 1977, Joseph Green after

Thus, when this case reached the Fourth Circuit the following factors which this Court in *Thornburg v. Gingles* held were critical to proving a Section 2 violation (478 U.S. at 50-51) were either resolved by the district court against the city or undisputed: (1) If Norfolk were subdivided into single-member districts, blacks would constitute voting majorities in two or three districts (679 F. Supp. at 566); (2) black voters are politically cohesive (*id.*); and (3) voting in Norfolk City Council elections is racially polarized. Every factor critical to a Section 2 violation had been resolved in plaintiffs' favor except one: Whether the racially polarized voting that prevails in city council elections is "legally significant." That is, the issue was whether plaintiffs had proven "that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed [citations omitted]—usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

In its prior decision the Fourth Circuit, instructed by this Court to apply *Gingles*, was faced with a conflict between the district court's conclusions concerning a high degree of minority electoral success and the undisputed fact that in two critical elections upon which the district court relied (1974 and 1980) the candidates who received the highest black vote percentages were defeated (see Pet., p. 4). Based on this Court's *Gingles* definition that legally significant bloc voting occurs when "the minority's preferred candidate" is defeated, the Fourth Cir-

---

first being appointed to the council in 1977) repeatedly was reelected, a second black council member was elected in 1984, and both have been reelected since. Under *Gingles* the reelection of black incumbents and the election of a second black representative during the pendency of litigation are "special circumstances" that do not diminish a Section 2 claim (886 F.2d at 1241-43) (see discussion in Section III, *infra*). The city's discussion also omits the critical fact that from 1968 to 1984 every black candidate who was not an incumbent lost.

cuit adopted the logical presumption that under the facts of this case black voters have not elected their "preferred candidate" when candidates who receive the highest black vote perecntages are defeated by candidates who receive less black support even though the winning candidates win more than 50 percent of the votes of black voters. *Collins IV*, 816 F.2d at 937.

No complex statistical methodology is needed to determine that when one candidate receives 73.4 percent of the black vote (as Bond did in 1974)—and is defeated—and two other candidates who receive only 58.2 percent and 56.5 percent of the black vote are elected (Howell and Staylor), black voters have not been successful in electing their "preferred candidate."

The Fourth Circuit also instructed the district court to consider whether "special circumstances," including the pendency of this lawsuit, resulted in the election of a second black council member in 1984. The Fourth Circuit ruled that if the mayor's statement and conduct resulted in "unusual white support for the black candidate in 1984, the legal significance of his success should be diminished." 816 F.2d at 938. The Fourth Circuit's decision in *Collins IV* (written by Circuit Judge Sam J. Irvin, III) was unanimous, and the city did not petition for rehearing or seek review of that ruling in this Court.

On remand, the district court readopted its prior, reversed opinion (678 F. Supp. at 562) and ruled once again that "black-preferred candidates usually win" (*id.* at 568). This conclusion was based on (1) counting two white candidates, Howell and Staylor in 1974 and Howell in 1980, as "black-preferred candidates" even though in both elections black candidates with higher black vote percentages lost, and (2) not discounting the election of a second black council member in 1984 after this lawsuit was filed or the repeated reelection of black incumbents as resulting from "special circumstances." 679 F. Supp. at 572-80. The district court all but ignored the Fourth

Circuit's instruction to presume that the candidates who received the highest percentages of the black votes are black voters' preferred candidates,[5] ignored the extensive evidence that supported the presumption, and held that the presumption had been rebutted (*id.* at 574-75). The district court also refused to discount the election of a second black council member in 1984, finding that "there was no evidence of unusual white voting patterns in the 1984 election" (*id.* at 577), and refused to hold that the 100-percent reelection rate of black incumbents was a special circumstance under *Gingles* (*id.* at 579).

The Fourth Circuit, after an intensive review of the factual record presented, held that the district court's conclusion that black-preferred candidates usually win was erroneous and that the *Gingles* definition of legally significant racially polarized voting had been met in this case. First, the court of appeals held that the district court failed properly to identify the minority's preferred candidates in the 1974 and 1980 elections. 883 F.2d at 1238-41. The defeat of the black-preferred candidates in 1974 and 1980, coupled with repeated defeat of all the candidates supported by overwhelming percentages of black votes for a second seat on the city council from 1968 to 1984, demonstrated that white bloc voting usually defeats the minority's preferred candidate in city council elections. *Id.* at 1240-41.

The Fourth Circuit also held that the district court's finding that there was no unusual white support for the second black council member in 1984 was "clearly erroneous," and his election was the result of "special circumstances" (*id.* at 1241-42). Under this Court's listing

---

[5] During oral argument in the district court, when plaintiffs' counsel, defending the Fourth Circuit's ruling, made the point that the statutory language adopted by Congress prohibits any electoral system that denies black voters an equal opportunity to elect candidates of their choice, the district judge responded: "Well, it doesn't say their top choice; it says their choice." Tr., Dec. 16, 1987, p. 62.

of "special circumstances" in *Gingles*, which includes incumbency (478 U.S. at 57), the Fourth Circuit also concluded that the district court contradicted *Gingles* by failing to count incumbency as one of the "special circumstances" that "do not negate the existence of the white bloc voting that has characterized the at-large elections in Norfolk" (*id.* at 1243).

REASONS WHY THE PETITION SHOULD BE DENIED

This case, which has now been litigated continuously for seven years and which already has been reviewed once by this Court and three times by the Fourth Circuit, does not present any issue requiring further review by this Court. The Fourth Circuit's decision relies heavily on this Court's decision in *Thornburg v. Gingles*, is entirely consistent with *Gingles*, and does not conflict with any court of appeals decision. The undisputed voting statistics clearly demonstrate that at-large city council elections deny black voters an equal opportunity to elect candidates of their choice, and this meets the test of the statute, 42 U.S.C. § 1973(b), and this Court's decision in *Thornburg v. Gingles* for proving a Section 2 violation.

The city's principal contention, that the Fourth Circuit found a Section 2 violation because black voters have not elected representatives "in proportion to their percentage in the voting population" (Pet., p. 15), is directly contradicted by the Fourth Circuit's decision itself which specifically rejects such a proportional representation standard. Moreover, the facts of record simply will not support a determination of that question by this Court.

Similarly, the city's contention that legally significant bloc voting has not been proven in this case because "the white cross-over vote has combined with the black vote to elect the black-preferred candidates *most* of the time" (Pet., p. 15) is an erroneous factual assertion that the Fourth Circuit has twice rejected, 816 F.2d at 937; 883

F.2d at 1238-41, and is unworthy of this Court's review. The Fourth Circuit's ruling on this issue is entirely consistent with this Court's *Gingles* decision and the decisions of other courts of appeals.

I. CONTRARY TO THE CITY'S ARGUMENT, THE COURT OF APPEALS DID NOT APPLY A PROPORTIONAL REPRESENTATION STANDARD.

Petitioners are wrong when they argue that the Fourth Circuit applied a proportional representation standard in this case (Pet., pp. 15, 17-22). Throughout this extended litigation, the Fourth Circuit repeatedly has rejected any use of a proportional representation standard for determining a Section 2 violation. 768 F.2d at 573 n.1 (quoting statute); 816 F.2d at 935 (quoting *Gingles*). In its latest decision, Fourth Circuit quoted the statute with its proviso against establishing a right to proportional representation (883 F.2d at 1234) and expressly stated: "But the complainants do not seek proportional representation, and the Act does not require it" (*id.* at 1243).

Nor does the majority decision have the effect of establishing a claim to proportional representation. Contrary to the city's argument, the Fourth Circuit's conclusion regarding legally significant polarized voting does not rest exclusively on the inability of black voters to elect a minority-preferred candidate to a second council seat. The Fourth Circuit's holding also is based on the defeat of black-preferred candidates in 1974 and 1980, as well as the fact that the few black electoral successes were due to special circumstances such as incumbency and the pendency of this lawsuit. To the extent that black voters' inability to elect a second black-preferred council member was one of several factors in the Fourth Circuit's analysis, it does not imply a proportional representation requirement, but merely effectuates the Congressional intent of determining whether black voters have an equal opportunity with white voters in Norfolk to elect candidates of their choice.

There is nothing in the Voting Rights Act that restricts the right of protected minority voters to elect candidates of their choice to only one seat. As this Court noted in *Gingles*, the legislative history of Section 2 clearly states Congress' intent that "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote." 478 U.S. at 75 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 29 n. 115 (1982)). Thus, this Court concluded that "the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim." *Id.*

Under this standard, even though some minority candidates have been elected, courts may still inquire whether minority voters are denied an equal opportunity to elect candidates of their choice and whether the election of some minority candidates is the result of "special circumstances." In *Gingles* this Court affirmed (with one exception) the district court's findings of Section 2 violations despite the fact that black candidates had been elected in at-large voting *in every district* contested in the Supreme Court appeal (and in one district, two had been elected in 1982). 478 U.S. at 58-61, 82, Appendix B (the contested districts were House Districts 21, 23, 36, and 39 and Senate District 22).[6] This Court rejected the argument, advanced by petitioners here, that the election of some black candidates shows that black voters have an equal opportunity to elect candidates of their choice in at-large voting and to hold otherwise would constitute a proportional representation test. See 478 U.S. at 74-76. The Fourth Circuit's decision also is consistent with decisions of other courts which have found a Section 2 violation or reversed adverse district court rulings even

---

[6] The only district in which this Court did not find a violation was House District 23, in which black voters had had proportional representation since 1972.

though minority representatives had been elected to office under the challenged at-large system.[7]

The petitioners' other arguments against the Fourth Circuit's decision made as part of their proportional representation argument (Pet., pp. 20-22) are similarly unfounded. The Fourth Circuit's ruling does not result in any *per se* rule against at-large elections (Pet., p. 20). Whether or not there is a Section 2 violation still depends upon whether the facts of the case meet the legal standards set forth by this Court in *Gingles*. Further, as the district court determined in *Gingles*, whether or not at-large election systems serve "important political values" (Pet., p. 20) is a policy decision resolved by Congress. In enacting Section 2, Congress took into account these considerations but made the "deliberate political judgment" that they were out-weighed by the need to eliminate racial discrimination in the electoral process. *Gingles v. Edmisten*, 590 F. Supp. 345, 356-57 (E.D. N.C. 1984) (three-judge court), *aff'd in relevant part sub nom. Thornburg v. Gingles*. The Fourth Circuit's decision, by requiring proof of the discriminatory impact of at-large voting, is consistent with that congressional judgment.

Contrary to the city's argument (Pet., p. 22) the Fourth Circuit did not assume that only black candidates can represent black voters. In both *Collins IV* and *Collins VI* the Fourth Circuit concluded that the race of the candidates was not determinative, and that black voters' preferences are determined not by the race of the candidates

---

[7] See, e.g., *Gomez v. City of Watsonville*, 863 F.2d 1407, 1409 n.1 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1534 (1989); *LULAC v. Midland Independent School District*, 812 F.2d 1494, 1496 (5th Cir.), *vac'd on rehearing en banc, district court decision finding Section 2 violation aff'd*, 829 F.2d 546 (5th Cir. 1987); *Velasquez v. City of Abilene*, 725 F.2d 1017, 1019 (5th Cir. 1984); *Brown v. Board of Commissioners of Chattanooga*, 722 F. Supp. 380, 394 (E.D. Tenn. 1989); *Jackson v. Edgefield County, South Carolina, School District*, 650 F. Supp. 1176, 1190-93 (D.S.C. 1986); *Windy Boy v. Big Horn County*, 647 F. Supp. 1002, 1018-20 (D. Mont. 1986).

but by the percentages of the black votes they received. *Collins IV*, 816 F.2d at 936 n.3, 937 and n.5; *Collins VI*, 883 F.2d at 1237 n.7, 1238. In its latest decision, the Fourth Circuit specifically referred to the defeat of a white candidate, Braxton Hill, as proof of black voters' inability to elect a second council member (883 F.2d at 1241). In any event, since in most of the elections the black voters' first choice for a second council seat was a black candidate (see Appendix 3), this is not a case requiring resolution of this issue.

In sum, the city's claim that the Fourth Circuit applied a proportional representation standard is contradicted by the opinions in this case and fails to present a substantial question for review.

II. CONTRARY TO PETITIONERS' ARGUMENT, THE FOURTH CIRCUIT'S DEFINITION OF "REPRESENTATIVES OF CHOICE" IS COMPLETELY CONSISTENT WITH *GINGLES* AND THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners' claims of minority electoral success boil down to the contention that the election of two white candidates with majority black support (Howell and Staylor in 1974 and Howell in 1980)—as well as the successive reelection of one black incumbent and the election of a second black incumbent in 1984 (discussed *infra*)—*ipso facto* negate plaintiffs' Section 2 claim and offset the numerous instances in which black-preferred candidates who received from 70 percent to over 90 percent of the black votes were defeated. As discussed above, this argument is inconsistent with the legislative history of Section 2 and the teachings of *Gingles* that the election of some minority candidates does not foreclose a Section 2 claim.

Regarding the 1974 and 1980 elections, the city's claim that the Fourth Circuit adopted too restricted a definition of who constitutes black voters' "representatives of choice"

(Pet., pp. 23-26) on the facts of this case fails to present a substantial issue for review. The Fourth Circuit's ruling on this issue is firmly grounded in the statutory language of Section 2 and the *Gingles* decision. Section 2 states that a violation is established if the challenged election system provides minority voters with less opportunity than others "to elect representatives of their choice," 42 U.S.C. § 1973(b). In *Gingles* this Court defined "the essence of a § 2 claim" as a case in which a challenged election practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect *their preferred representatives.*" 478 U.S. at 30 (emphasis added). Similarly, the question of legally-significant polarized voting hinges on the usual defeat of "the minority's preferred candidate." *Id.* at 51.

Thus, the Fourth Circuit was only following the language of the statute and this Court's formulation of the proper legal test when it adopted a logical and commonsense interpretation of the term "minority's preferred candidate." The court of appeals correctly took it to imply that the mere election of a candidate with more than 50 percent of the black votes does not necessarily count as a minority electoral success when (a) voters can vote for more than one candidate on the ballot and (b) other candidates who receive significantly higher black vote percentages are defeated in the same election. 816 F.2d at 935 (*Gingles* focuses on "the *actual results* of minority-preferred candidates in winning elections."), 937. The Fourth Circuit did not establish this as an immutable legal principle, but only as a rebuttable presumption subject to the standards and limitations of Rule 301, Fed. R. Evid., (883 F.2d at 1238) under which the burden of proof remains with the plaintiffs. The presumption has a sound basis because it is rationally related to the issue to be proved and provides an objective and verifiable standard for courts to determine whether minority-preferred candidates have been elected or defeated.

As *Gingles* and the Fourth Circuit's decisions make clear (see 883 F.2d at 1239-40), the fact that less-preferred candidates can still receive black voting majorities is a particular function of the multiple-seat, multiple-vote voting system under which voters can cast ballots equal to the number of seats to be filled. The district court in *Gingles* noted that under such a system, black voters may single-shot vote but only by forfeiting their right to vote for a full slate of candidates. *Gingles v. Edmisten*, 590 F. Supp. at 369. On the other hand, if black voters want to use their full voting power, they must also cast ballots for less-preferred candidates who are not necessarily their candidates of choice, some of whom may end up winning with black majorities.

There is a consensus among the courts of appeals—reflected in decisions which this Court declined to review last term—that simply because a candidate receives more than 50 percent of the black votes does not necessarily make that candidate the black-preferred candidate. As the Fifth Circuit held in *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989): "Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference." Similarly, in *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989), the Fifth Circuit rejected the argument that "any time a candidate gets a majority of the minority votes he is the 'chosen representative' of the minority group." Contrary to petitioners' argument, these Fifth Circuit decisions support the Fourth's Circuit's ruling and were cited by the Fourth Circuit in support of its application of this standard (883 F.2d at 1240).[8]

[8] The Tenth Circuit's opinion in *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. pending*, No. 89-353, is not inconsistent with

Petitioners then argue that once the Fourth Circuit defined who constitutes the "minority's preferred candidate," the court of appeals misapplied its own definition developed in this case. (Pet., pp. 25-26). Whether or not this presumption was rebutted was an issue for the court of appeals to determine on the factual record presented in this case and does not merit Supreme Court review. The Fourth Circuit was correct that the district court failed properly to apply this legal standard because it treated all successful candidates who received more than 50 percent of the black vote as "black-preferred candidates" without giving any weight to the rank order of preferences or the differences in black vote percentages among the candidates who won black majorities. See 679 F. Supp. at 568, 574-75.

Indeed, the district court's ruling is entirely unprecedented. Until this case, no court has ever held that in a white-black contest with racially polarized voting, as between a black candidate who receives over 73 percent of the black vote and a white candidate who receives only 58 percent, that the white candidate is the preferred candidate of black voters. While petitioners attempt to argue that the court of appeals' decision creates a startling new rule of law, precisely the opposite is true. The court of appeals properly corrected the district court's anomalous holding.

The Fourth Circuit also is correct that the city's proof was not sufficient to overcome the presumption established by defendants' own statistics that Bond in 1974 and Butts in 1980 were black voters' preferred candidates. 883 F.2d at 1238-40. Endorsements by one black endorsement group, the Concerned Citizens organization, do not necessarily rebut this presumption because the group did not rank its endorsements in order of prefer-

---

this standard. In that case there was no finding that in the same election, Anglo candidates won with Hispanic majorities but Hispanic candidates who received higher Hispanic vote percentages lost.

ence and because the black vote percentages received by the candidates is a better measure of the strength of black electoral support than mere endorsements by one group, which may or may not reflect the preferences of the entire black community. Similarly, the fact that a few minor black candidates got lower black vote percentages than Staylor and Howell is immaterial to the issue of whether Bond and Butts were the preferred candidates of the black voters over Howell and Staylor. 883 F.2d at 1238.

Further, evidence that the district court ignored in its opinion clearly demonstrates that Howell and Staylor were not the black voters' representatives of choice: (1) black voters preferred the black candidates who lost over the white candidates who won by substantial differences of 15 to 20 percentage points; (2) black community leaders, including the black incumbent council member, did not consider Howell and Staylor to be black community representatives, nor did Howell or Staylor consider themselves black community representatives;[9] and (3) after they won with black majorities, both Howell (in 1984) and Staylor (in 1978) lost their black majorities in subsequent elections yet were reelected with white majorities, showing both that they were not black voters' representatives of choice and were not electorally accountable to the black voters. 883 F.2d at 1238-39.

The court of appeals' definition of who constitutes the minority's preferred candidate and representative of choice on the facts of this case does not present a substantial issue requiring review by this Court.

---

[9] Howell's and Staylor's substantive views on issues of concern to the black community, which petitioners contend were irrelevant (Pet., pp. 25-26), were indeed relevant to whether they considered themselves black community representatives and whether they were responsive to black interests. The legislative history of Section 2 indicates that whether elected officials are responsive to the minority community is one evidentiary factor relevant to a Section 2 violation. *Gingles*, 478 U.S. at 45.

III. CONTRARY TO PETITIONERS' ARGUMENT, THE COURT OF APPEALS CORRECTLY CONSIDERED BLACK ELECTORAL SUCCESSES AS "SPECIAL CIRCUMSTANCES" UNDER THIS COURT'S *GINGLES* DECISION.

In *Gingles* this Court held that the election of some black candidates does not negate a Section 2 claim when it results from such "special circumstances" as the absence of an opponent, incumbency, and bullet voting, 478 U.S. at 57, 60-61, or when it occurs only after a vote dilution lawsuit has been filed, *id.* at 76. When these special circumstances are present, the electoral success of some black candidates does "not negate other evidence, derived from all of the elections . . . . that legally significant racially polarized voting exists . . ." *Id.* at 60.

A. The Election of a Second Black Council Member After this Lawsuit Was Filed.

Contrary to petitioners' argument (Pet., pp. 26-27), the court of appeals correctly concluded that the election of a second black council member, the Rev. John Foster, after this lawsuit was filed and three weeks before the trial in 1984 did not foreclose plaintiffs' vote dilution claim, and that conclusion was not based on any alleged proportional representation standard. As the Fourth Circuit noted in its prior opinion (816 F.2d at 938), the 1984 election was abberational.

> Never before in the history of the city had two black councilmen served simultaneously. Nevertheless, the mayor supported a second black candidate for the first time. He coupled his unprecedented support with the public statement, "After the election, the issue of black representation may become a moot point." [10]

[10] This is stronger evidence of the impact the election of a black candidate might have on pending vote dilution litigation than that described in any reported case. See *Gingles v. Edmiston*, 590 F. Supp. at 367; *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

The Fourth Circuit therefore instructed the district court to determine whether the mayor's conduct and statement produced any "unusual white support for the black candidate in 1984," and if it did, to diminish the legal significance of that election. 816 F.2d at 938.

The Fourth Circuit is correct that the district court's finding that there was "no evidence" of unusual white support for Foster in the 1984 election (679 F. Supp. at 577) was contrary to the overwhelming weight of the evidence and clearly erroneous within the meaning of Rule 52. 883 F.2d at 1241-42. First, Foster, the black candidate, for all practical purposes was unopposed (itself a special circumstance under *Gingles*) because there were only two competitive white candidates and three seats were open. One of the city's own witnesses described the 1984 election as "unique." The "west side group," an all-white slating group with which the mayor was affiliated, endorsed only two candidates when three seats were vacant. 883 F.2d at 1241-42. The voting statistics themselves confirm that there were only two competitive white candidates in the race who got white majorities, despite the fact that three seats were open and there were six white candidates (Appendix 3).

Second, the city's own statistics show that Foster got an unusually high level of white votes. Foster's 26.6 percent white crossover vote—which provided him the margin of victory—was by far the highest percentage received by any nonincumbent black candidate since 1968 and the fourth highest received by any black candidate—incumbent or nonincumbent—in city council elections. Foster's white crossover vote was 90 percent higher than the highest white crossover vote previously cast for a nonincumbent black candidate. 883 F.2d at 1242.[11]

[11] Defendants own statistics which the district court credited also show that in 1984 white voters, who normally ranked black candidates fifth, sixth, or seventh, ranked Foster, the black candidate, *third* among all the candidates in the election. In no other election

The "clearly erroneous" rule, while it requires careful deference to district court findings of fact, does not completely insulate district court findings from appellate review, and appellate courts in voting rights cases retain the authority under Rule 52(a) to reverse district court findings that are clearly erroneous. *Gingles*, 478 U.S. at 77-79; *Gomez v. City of Watsonville*, 863 F.2d at 1414, 1416; *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1558-59 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1111 (1988).

B. The Repeated Reelection of Black Incumbents.

The court of appeals was correct to hold, on the district court's own finding, that incumbency conferred a special advantage on black incumbents that did not undermine the other evidence of legally significant polarized voting. 883 F.2d at 1243. The district court found that for black candidates incumbency was a significant predictor of electoral success: "the reelection rate for black incumbents is 100 percent, which is greater than that of whites" (679 F. Supp. at 579). From 1968 to 1984 no black candidate who was not an incumbent was elected,[12] and since 1984 only black incumbents have won. Except for 1968 and 1984, the only black candidates whites have been willing to vote for in sufficient numbers to get them elected have been black incumbents. Nonetheless, no black incumbent has ever received more than 32 percent of the white votes.

Petitioners are wrong to suggest that there was nothing abberational about the election of black incumbents (Pet., p. 27), since, apart from 1968 and 1984, those

---

has a black candidate come in third among white voters, except for one (1976) (see Appendix 3).

[12] In 1977 the single black council member, Joseph Jordan, resigned and another black, the Rev. Joseph Green, was appointed by the council to the vacancy. Thus, when Green ran for the seat in 1978 he was running as an incumbent.

were the only black candidates who won. The district court's finding on which they base their argument (*id.*) that white voters consistently have been willing "to re-elect black incumbents and to elect other blacks" (679 F. Supp. at 579) is factually wrong since black nonincumbents have almost always lost.

Since the court of appeals' rulings on these black electoral successes are completely consistent with this Court's rulings in *Gingles*, they fail to present an issue for review.

There is nothing in the court of appeals' decision that represents a departure from the directions this Court gave to the court of appeals in 1986 to reconsider this case according to the standards set forth in *Thornburg v. Gingles*. In reversing the district court's decision, the Fourth Circuit carefully followed the *Gingles* legal standards, and its decision does not conflict with any other court of appeals' decision.

Petitioners are wrong when they suggest that this case is the first post-*Gingles* case in which a court of appeals reversed a district court finding of no Section 2 violation (Pet., p. 29). This also occurred in two cases they cite in their petition, *Gomez v. City of Watsonville* and *Carrollton Branch of NAACP v. Stallings*, and this Court declined to review both of those decisions. Petitioners also are wrong when they argue that the Fourth Circuit's decision imperils all at-large election systems. It only imperils at-large election systems that deny minority voters an equal opportunity to elect candidates of their choice to office, and this is what Congress intended in enacting Section 2 of the Voting Rights Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BARBARA R. ARNWINE
FRANK R. PARKER *
BRENDA J. WRIGHT
ROBERT B. MCDUFF
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W., Suite 400
Washington, D.C. 20005
(202) 371-1212

JAMES F. GAY
1317 East Brambleton Avenue
Norfolk, Virginia 23504
(804) 627-3100

* Counsel of Record

Attorneys for Respondents

APPENDICES

APPENDIX 1

All Candidates Who Received More Than 50 Percent of the Votes of White Voters, 1968-1986.

Name	Race	Year	White %	Black %
Leafe	W	1984	86.3	19.6
Andrews	W	1982	79.9	5.8
Thomas	W	1976	79.0	1.6
Phillips	W	1976	77.9	2.9
Staylor	W	1982	75.3	1.6
Barfield	W	1968	72.7	4.1
Andrews	W	1986	72.6	38.4
Andrews	W	1978	72.2	43.5
Summers	W	1982	72.1	2.1
Thomas	W	1980	71.3	4.1
Ballard	W	1968	70.0	3.5
Howell	W	1984	68.8	39.8
Leafe	W	1980	68.1	1.7
Staylor	W	1978	67.5	1.7
Fraim	W	1986	67.0	29.8
Summers	W	1970	66.8	5.5
Staylor	W	1974	66.8	56.5
Summers	W	1978	64.6	4.0
Middleton	W	1978	64.1	3.3
Schweitzer	W	1968	63.7	4.9
Hughes	W	1970	63.2	8.1
Wright	W	1986	60.3	3.8
Hurst	W	1972	59.0	35.6
Andrews	W	1974	58.0	16.7
Nusbaum	W	1970	57.9	10.1
Phillips	W	1980	56.3	2.7
Hill	W	1972	55.6	32.2
Martin	W	1970	55.1	10.8
Summers	W	1974	51.1	7.6
Phillips	W	1986	50.3	29.?

Source: Defendants' statistics, Exs. D-470A-470I 1968-84; stipulation of the parties (1986).

APPENDIX 2

All Candidates Who Received More Than 50 Percent of the Votes of Black Voters, 1968-1986.

Name	Race	Year	White %	Black %
Jordan	B	1972	22.3	98.3
Jordan	B	1976	24.3	97.3
Green	B	1978	32.2	96.1
Butts	B	1980	9.5	92.9
Walton	B	1970	14.0	92.4
Jordan	B	1968	28.7	91.9
Green	B	1986	27.3	90.3
Green	B	1982	31.1	88.2
Butts	B	1982	11.2	87.6
Harris	B	1986	4.8	84.1
Foster	B	1984	26.6	79.9
Hill	W	1976	20.0	76.3
Hurst	W	1976	21.7	75.6
Bond	B	1974	7.6	73.4
Howell	W	1980	31.7	72.9
Butts	B	1984	24.2	72.1
Howell	W	1978	26.6	68.5
Howell	W	1974	38.2	58.2
Staylor	W	1974	66.8	56.5

Source: Defendants' statistics, Exs. D-470A-470I (1968-84); stipulation of the parties (1986).

APPENDIX 3

All Candidates Who Received More Than 20 Percent of White or Black Votes for Each Election.

	White Votes				Black Votes			
	For White Candidates		For Black Candidates		For White Candidates		For Black Candidates	
1968 (3)	Ballard-E	70.0					Jordan-E	91.9
	Barfield-E	72.7						
	Schweitzer	63.7						
	Willis	32.1						
					Willis	28.9		
			Jordan-E	28.7				
					Schweitzer	4.9		
					Barfield-E	4.1		
					Ballard-E	3.5		
1970 (6)	Summers-E	66.8					Walton	92.4
	Hughes-E	63.2						
	Nusbaum-E	57.9						
	Martin-E	55.1						
	Hill-E	49.7						
	Perry	46.2						
	Hurst-E	43.2						
					Hurst-E	40.8		
					Gottlieb	34.9		
					Hanckel	33.7		
					Kissinger	31.2		
	Gottleib	28.3						
	Willis	28.0						
					Sichta	26.5		
	Hanckel	25.3						
	Ogg	21.0						
			Walton	14.0				
	Kissinger	10.6			Martin-E	10.8		
	Sichta	8.2			Nusbaum-E	10.1		
					Hughes-E	8.1		
					Willis	6.4		
					Hill-E	6.3		
					Perry	5.7		
					Summers-E	5.5		
					Ogg	1.5		

E- Elected

Source: Defendants' statistics, Exs. D-470A-470I (1968-84); stipulation of the parties (1986).

	White Votes				Black Votes			
	For White Candidates		For Black Candidates		For White Candidates		For Black Candidates	
1972 (3)	Hurst-E	59.0					Jordan-E	98.3
	Hill, I.-E	55.6						
	Hill B.	44.6						
	Parsons	39.8						
					Hurst-E	35.6		
					Hill, I.-E	32.2		
	Wallace	26.3						
			Jordan-E	22.3				
					Hill, B.	10.0		
					Parsons	6.1		
					Wallace	0.8		
1974 (4)							Bond	73.4
	Staylor-E	66.8						
	Andrews-E	58.0			Howell-E	58.2		
					Staylor-E	56.5		
	Summers-E	51.1						
	Hughes	40.8						
	Howell-E	38.2						
							Reid	36.4
	Blassingham	23.2						
					Andrews-E	16.7		
			Bond	7.6	Summers-E	7.6		
			Reid	3.0	Hughes	1.1		
					Blassingham	0.9		
1976 (3)	Thomas-E	79.0					Jordan-E	97.3
	Phillips-E	77.9						
					Hill	76.3		
					Hurst	75.6		
			Jordan-E	24.3				
	Hurst	21.7						
	Hill	20.0						
					Phillips-E	2.9		
					Thomas-E	1.6		
1978 (5)	Andrews-E	72.2					Green-E	96.1
					Howell-E	68.5		
	Staylor-E	67.5						
	Summers-E	64.6						
	Middleton	64.1						
					White	42.8		
					Copeland	45.0		
					Andrews-E	43.5		

	White Votes				Black Votes			
	For White Candidates		For Black Candidates		For White Candidates		For Black Candidates	
1978	(continued)							
	White	40.5						
			Green-E	32.2				
	Copeland	32.0						
	Howell-E	26.6						
					Summers-E	4.0		
					Middleton	3.3		
					Staylor-E	1.7		
1980	Thomas-E	71.3					Butts	92.9
(3)	Leafe-E	68.1						
	Phillips	56.3			Howell-E	72.9		
							Banks	34.5
	Howell-E	31.7						
					Thomas-E	4.1		
			Butts	9.5	Phillips	2.7		
	Banks	2.3			Leafe-E	1.7		
1982	Andrews-E	79.9					Green-E	88.2
(4)	Staylor-E	75.3					Butts	87.6
	Summers-E	72.1						
	Ryan	41.1						
			Green-E	31.1				
			Butts	11.2			Gay	29.6
							Collins	27.5
			Gay	4.1	Andrews-E	5.8		
			Collins	2.6	Summers-E	2.1		
					Staylor-E	1.6		
					Ryan	0.9		
1984	Leafe-E	86.3					Foster-E	79.9
(3)	Howell-E	68.8					Butts	72.1
					Howell-E	39.8		
			Foster-E	26.6				
			Butts	24.2				
	Armstrong	20.7						
					Leafe-E	19.6		
					Armstrong	2.1		
1986	Andrews-E	72.6					Green-E	90.3
(4)	Fraim-E	67.0					Harris	84.1
	Wright	60.3			Andrews-E	38.4		
	Phillips-E	50.3			Hailey	34.2		
	Hailey	30.8			Fraim-E	29.8		
					Phillips-E	29.3		
			Green-E	27.3	Wright	3.8		
			Harris	4.8				

FILED
JAN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS,
BRENT & CHAPPELL
1200 Mutual Building
909 East Main Street
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
Office of the City Attorney
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

Anderson v. City of Bessemer, 470 U.S. 464 (1985) 7

Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989) .. 6

Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989) 6

Diaz v. Patterson, 263 U.S. 399 (1923) 5

Sanchez v. Bond, 875 F.2d 1488 (1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989) 4, 6

Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*

Williams v. State Board of Elections, 718 F.Supp. 1324, 1328 n.8 (N.D. Ill. 1989) 6

Statutes and Rule:

Section 2 of Voting Rights Act, 42 U.S.C. § 1973 .... *passim*

Fed. R. Civ. P. 52(a) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

Respondents contend (Br. in Opp. 9-10) that the Fourth Circuit, in striking down the at-large voting system in Norfolk, merely applied settled principles embodied in Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the decision of this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). But two things to the contrary stand out clearly from the court of appeals' decision. First, the court viewed this case as turning specifically on whether black voters were able to elect *two* representatives to the Norfolk City Council (*i.e.*, the number roughly proportional to their percentage of the population). Second, the court concluded that black voters had been unable to elect the requisite number of representatives primarily by adopting a legal presump-

tion that certain officials with majority black support were not "representatives of choice" and, further, by finding that other officials were elected because of "special circumstances." As we discuss below, respondents' efforts to soft-peddle these new rules are wholly unpersuasive.

I. THE COURT OF APPEALS APPLIED A PROPORTIONAL REPRESENTATION STANDARD.

Respondents quite correctly note that the Fourth Circuit acknowledged the proviso of Section 2 disclaiming proportional representation as the standard for a violation (Br. in Opp. 10). But the court of appeals' own words make absolutely clear that the goal of proportional representation controlled its analysis of the case. At the very beginning of its opinion, the court defined the "principal issue" as "whether the complainants have less opportunity than other members of the electorate to elect *more than one* councilman as the 'representatives of their choice.'" Pet. App. 2a (emphasis added). Shortly thereafter in its review of the facts, the court expressly compared the black percentage of total population with the degree of electoral success, observing that "[a]lthough the city's population is 35% black and the rate of black participation in the electoral process is high, black citizens were unable to elect *more than one black* member (14%) to the seven-member council until after this case commenced." Pet. App. 4a-5a (emphasis added).

The court of appeals returned to and further stressed this theme in its all-important analysis of minority voting success. It began by stating explicitly that "[i]f the degree of minority electoral success necessary to defeat this voting rights action were the ability to elect a single candidate to the council, this action would border on the frivolous"; it then noted, however, that "this case involves the community's inability to elect *a second member* until after the institution of this action." Pet. App.

15a (emphasis added). Next, after acknowledging that most black candidates receiving at least 70% black voter support have won in Norfolk, with victories in 7 of 10 elections between 1968 and 1986, the court dismissed these statistics as "superficial," on the ground that they "ignore the fact that from 1968 until after this action was brought, the black community was unable to elect a *second representative* to the city council." Pet. App. 15a (emphasis added). Then, having recited the definition of legally significant polarized voting set forth in *Gingles*, the Fourth Circuit stated that "[i]n the context of this case it is necessary to apply *Gingles*' teaching to the black community's attempt to elect a *second black* councilman." Pet. App. 15a (emphasis added). The analysis that followed was focused entirely on elections for this "second seat." See Pet. App. 16a (white voting patterns defeated "minority preferred candidates who sought a second seat on the council"); *ibid.* ("black community . . . could not elect a second representative of their choice"); *ibid.* ("minority-preferred candidates for a second seat on the council were defeated by candidates preferred by white voters").

If this emphasis on electing representatives to a "second seat" is not tantamount to an inquiry into "proportional representation," it is hard to imagine just what it could be. Certainly, Judge Chapman had no difficulty in recognizing the analysis as one equating a violation with a lack of proportionality: "There is no other way to construe this language than to conclude that the failure to achieve proportionality and the § 2 violation are one and the same." Pet. App. 33a. Judge Chapman, in fact, observed that "the decision does not merely creep up to the notion of proportionality, it embraces it." *Ibid.*

Respondents counter (Br. in Opp. 11) that nothing in the Voting Rights Act "restricts the right of protected minority voters to elect candidates of their choice to only one seat." But this assertion only begs the question. The

Act declares, in the plainest of language, that it is not establishing a right to proportional representation. In this case, however, the Fourth Circuit has concluded that a city in which black-supported candidates have usually won over two decades must abolish its long-standing electoral system because the system (in its view, at least) does not produce proportional representation.[1] Nothing in the Act or in *Gingles* provides a sound basis for that approach.[2]

II. THE COURT OF APPEALS APPLIED AN IMPROPER DEFINITION OF "REPRESENTATIVES OF CHOICE."

Respondents' brief makes it clear that there is no dispute between the parties as to the numbers: the candidates supported by a majority of the black voters of Norfolk usually have been elected. *See* Pet. 4 (Table). The parties differ over the meaning of the statutory term "representatives of choice."

The proper definition of "representatives of choice" is of critical importance in this case. The Fourth Circuit and respondents say that, even in multi-seat elections, a

---

[1] Only by eliminating several successful candidates found by the district court to be representatives of choice could the Fourth Circuit even conclude that the black community's representation on City Council was not usually proportional. See pages 4-8, *infra*.

[2] Respondents do not defend the court of appeals' focus on *black* candidates in judging black voters' ability to fill a second council seat. The relevance of candidates' race is, as *Gingles* makes clear, an open question. It is also an important question. In this regard, the approach of the Fourth Circuit here conflicts with the Tenth Circuit's ruling in *Sanchez v. Bond*, 875 F.2d 1488, 1496 (10th Cir. 1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989), rejecting a § 2 vote-dilution claim by Hispanic voters based on the election of non-Hispanics. That inconsistency cannot be dismissed simply by pointing out, as respondents do (Br. in Opp. 15 n.8), that *Sanchez* involved different facts.

candidate receiving a majority of black votes should be presumed not to be a "representative of choice" whenever an unsuccessful candidate receives more black votes. In that circumstance, according to respondents and the court of appeals, there is only one "representative of choice"—the unsuccessful candidate—even though several seats were at issue, voters had the opportunity to vote for more than one black candidate, and the successful candidates received not just majority black voter support but black political endorsement as well. Br. in Opp. 3, 7, 16. In our view, this sort of line-drawing takes too narrow a view of the statutory term. Rather, as the district court ruled, in elections like Norfolk's, *all* of the candidates receiving majority black support are properly considered "representatives of choice." [3] A loss by the first-ranked candidate, of course, counts as a defeat in the portion of the *Gingles* analysis that considers "usual defeat." But such a loss does not mean that there is only one representative of choice in a multi-seat election. A presumption to the contrary is improper.[4]

As we have noted, the position taken by the Fourth Circuit is at odds with the position taken by the Fifth

---

[3] Respondents are wrong in stating (Br. in Opp. 16) that the district court held that, "as between a black candidate who receives over 73% of the black vote and a white candidate who receives only 58%, . . . the white candidate is the preferred candidate of black voters." Rather, the district court considered *both* of the candidates receiving majority black support as representatives of black voters' choice. *See* Pet. App. 56a, 66a, 68a.

[4] There is no merit to respondents' suggestion (Br. in Opp. 2, 7) that petitioners cannot challenge use of this presumption because we did not seek review of the decision in *Collins IV* announcing the presumption. It is well-established that when a court of appeals announces a legal rule and remands the case for its application, a litigant may challenge both the rule and the application in appeals following the proceedings on remand. *Diaz v. Patterson*, 263 U.S. 399 (1923).

Circuit in *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989), and with the position taken by the United States as Amicus Curiae in *Gretna* (No. 88-597, at 11). See also *Williams v. State Board of Elections*, 718 F. Supp. 1324, 1328 n.8 (N.D.Ill. 1989), and *Sanchez v. Bond*, 875 F.2d 1488 (1989), *cert. pet'n filed*, No. 89-353 (Aug. 28, 1989). In *Gretna*, the Fifth Circuit stated directly:

> In a multiple seat election such as Gretna's aldermanic race, the minority *necessarily* will have more than one preferred candidate. 834 F.2d at 502, (emphasis added).[5]

We submit that the view of the Fifth Circuit, and not that of the Fourth Circuit, is the correct one. But, in any event, the issue is one of considerable importance and warrants the attention of this Court.[6]

---

[5] Respondents' attempt to distinguish *Gretna* (Br. in Opp. 15) serves only to emphasize the conflict between the two Circuits. The quote relied on by respondents makes clear that, when black voters support more than one candidate in a multi-seat election, *all* of the candidates should be counted in determining whether the voters are usually unable to elect "representatives of their choice." Had the Fourth Circuit followed that course here, it could not have removed Mr. Staylor and Mrs. Howell in 1974 and Mrs. Howell in 1980 from the "win" column.

[6] Respondents' reliance on *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989), is misplaced. In *Campos*, the Fifth Circuit affirmed a district court finding that the white candidates were not representatives of black voters' choice in elections in which no black candidates ran. *Id.* at 1245. That ruling—based on the district court's finding that black voters had no real choice in those elections—has no application here, for the district court in this case made a contrary finding and black candidates ran in all of the elections at issue.

III. THE COURT OF APPEALS ERRONEOUSLY APPLIED A "SPECIAL CIRCUMSTANCES" TEST, DISCOUNTING BLACK ELECTORAL SUCCESSES.

Having discounted several black electoral successes because of the presumption just discussed, the court of appeals went on to discount other successes as the products of two "special circumstances": the pendency of this lawsuit and the fact that some black elected officials were incumbents. Since respondents add little to what the court below said, we make only a few brief points.

First, we note again that the facts involved in the election of Rev. John Foster in 1984 (after this suit had begun) were thoroughly reviewed and discussed by the district court.[7] The Fourth Circuit not only too lightly displaced the district court as the fact finder (contrary to Rule 52(a) and *Anderson v. City of Bessemer*, 470 U.S. 464 (1985)), but it did so by improperly focusing once again on the need for a *second* black council seat. That is to say, the Fourth Circuit's conclusion rested chiefly on the erroneous approach that, in judging whether Reverend Foster received unusual white support, the only proper basis for comparison was the white support given to *black* candidates seeking a *second* council

---

[7] Respondents improperly denigrate the John Foster victory in 1984, claiming that "for all practical purposes [he] was unopposed . . . because there were only two *competitive* white candidates and three seats were open." Br. in Opp. 19 (emphasis added). There were ten candidates for three seats in that election, four black candidates and six white candidates. Pet. App. 208a. Mrs. Butts received an almost identical number of white votes as John Foster. Had black voters shifted their votes away from Mrs. Howell, who was endorsed by the Rainbow Coalition, to Mrs. Butts, both Mrs. Butts and Rev. Foster would have won. Respondents' continued insinuation (Br. in Opp. 19) that one of three seats was left open by an alleged white slating group was considered and found unsubstantiated by the district court and not disturbed on appeal. Pet. App. 76a-78a. Rather than showing a unique election, the results were consistent with the coalition politics evident in Norfolk since 1968.

seat in other elections. That focus has no more place here than in the analysis of election results as a whole.

Second, as to incumbency, neither legal principle nor common sense dictates that the "*repeated* re-election of black incumbents" (Br. in Opp. 20 (emphasis added)) should be a basis for discounting electoral successes. A councilman elected with strong black support, as a general rule, should be no less a "representative of [black voters'] choice" simply because he had been elected with similar support before. Here, measured by any reasonable standard, the re-election of Joseph Jordan in 1972 and 1976, the re-election of Joseph Green in 1982 and 1986, and the re-election of John Foster in 1988, all by overwhelming black majority vote, are properly regarded as black electoral successes.

IV. THE COURT OF APPEALS FAILED TO ADDRESS THE DISTRICT COURT'S "TOTALITY OF CIRCUMSTANCES" DETERMINATION.

As noted in the petition, in none of the post-*Gingles* decisions to come before this Court had a district court found every factor relevant to a Section 2 violation in favor of the jurisdiction and yet been reversed on liability by a court of appeals.[8] While respondents suggest that "the effects of . . . past discrimination continue to be perpetuated," (Br. in Opp. 3), the district court found to the contrary (Pet. App. 42a), and these findings were

---

[8] Respondents assert that when this case reached the Fourth Circuit "[e]very factor critical to a Section 2 violation had been resolved in plaintiffs' favor except one." Br. in Opp. 6. If, as it appears, respondents are referring to the three "precondiitons" identified in *Gingles*, the statement erroneously suggests that simply meeting the preconditions is enough to establish a violation of Section 2 without regard to the "totality of circumstances." If respondents are referring to the "factors" set out in the Senate Report as relevant to a Section 2 violation, the statement is incorrect. All of the Senate Report "factors" had been resolved in petitioners' favor. Pet. App. 42a-43a.

not challenged on appeal. By use of an erroneous definition of legally significant polarized voting, the court of appeals would allow respondents to "prove" a Voting Rights Act violation without addressing the detailed findings of the district court that under the "totality of circumstances" the black population of Norfolk has an equal opportunity to elect representatives of choice. That is flatly contrary to the teaching of *Gingles*.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the writ should be granted.

Respectfully submitted,

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS,
BRENT & CHAPPELL
1200 Mutual Building
909 East Main Street
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
Office of the City Attorney
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

* Counsel of Record

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-989

In the Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, VIRGINIA, ET AL., PETITIONERS

v.

HERBERT M. COLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING GORNSTEIN
Attorneys
Department of Justcie
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a minority group's consistent ability to elect one representative of choice to a city council elected under an at-large voting system is necessarily sufficient to defeat a challenge to that system under Section 2 of the Voting Rights Act, when the minority group would have the opportunity to elect at least two representatives if the council were elected from fairly drawn single-member districts.

2. Whether an at-large electoral system, in which a minority group has the opportunity to elect candidates of its choice who are not members of the minority group, but the minority group has no opportunity to elect candidates of its choice who are members of the minority group, may be in violation of Section 2 of the Voting Rights Act.

3. Whether the court of appeals erred in reversing as clearly erroneous the district court's finding that no special circumstances explained the election of several black-preferred candidates to the City Council in Norfolk after this litigation was filed in 1983.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Citizens for a Better Gretna v. *City of Gretna*, 834 F.2d 496 (5th Cir. 1987), cert. denied, 109 S. Ct. 3213 (1989)	14, 15
McGhee v. *Granville County*, 860 F.2d 110 (4th Cir. 1988)	10
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982)	16
Solomon v. *Liberty County*, No. 87-3406 (11th Cir. Apr. 5, 1990)	8, 18
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	2, 9, 10, 12, 17
Whitfield v. *Democratic Party*, No. 88-1953 (8th Cir. May 4, 1990)	8

Statutes and rule:

Voting Rights Act, 42 U.S.C. 1973 *et seq.*:	
§ 2, 42 U.S.C. 1973	2, 6, 8, 9, 10, 12, 14, 17, 18
§ 2(b), 42 U.S.C. 1973(b)	9, 10
Fed. R. Civ. P. 52	16

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-989

CITY OF NORFOLK, VIRGINIA, ET AL., PETITIONERS

v.

HERBERT M. COLLINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The City of Norfolk, Virginia uses an at-large system to elect its city council. The council has seven members who serve staggered four-year terms. Elections are held every two years, with three seats open one election year and four the next. Candidates run for all open seats, and the three (or four) candidates with the most votes win. Voters may vote for as many candidates as there are open seats, but they may also vote for fewer. Pet. App. 3a-4a, 42a.

Blacks constitute 35% of Norfolk's population and 31% of its voting age population (Pet. App. 4a). Until 1968, all members of the council were white (*ibid.*). A black was elected that year, and there has been at least

one black on the council ever since (*id.* at 4a-5a). Between 1970 and 1982, black candidates running in four elections in which the black incumbent was either not up for election or was himself also running for reelection received a majority of votes from black voters and lost (*id.* at 16a). In 1984, after this suit was filed, a second black, Foster, was elected, and two blacks have served on the council simultaneously since then (*id.* at 5a). Since 1968, two whites—Howell and Staylor—have been elected to the council with majority black support (Pet. 4). Howell was elected three times with majority black support; Staylor was elected once (*ibid.*).

2. Plaintiffs are seven black citizens of Norfolk and the Norfolk Branch of the NAACP (Pet. App. 2a). In 1983, they filed this suit alleging that the at-large method of electing members to the city council denies black voters an equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973 (Pet. App. 2a, 3a n.2).

After a trial, the district court ruled for the City of Norfolk (Pet. App. 132a-193a), and the Fourth Circuit affirmed (*id.* at 114a-131a). This Court vacated and remanded to the Fourth Circuit for reconsideration in light of *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) (Pet. App. 113a). In *Gingles*, this Court held that there are three preconditions to a finding that an at-large system violates Section 2: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * * —usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. The Fourth Circuit in turn remanded the case to the district court to decide these issues (Pet. App. 99a-112a).

3. The district court once again ruled in favor of Norfolk (Pet. App. 38a-98a). It found Norfolk's black population sufficiently large and geographically compact to constitute an effective voting majority in two single-member districts (*id.* at 51a). The court also found that Norfolk blacks are politically cohesive (*id.* at 52a). The court found, however, that whites voting as a bloc are not usually able to defeat minority-preferred candidates (*ibid.*). In reaching this conclusion, the court relied on evidence that, since 1968, 11 of the 19 candidates receiving majority black support have won (*id.* at 66a-67a). The court also cited evidence that, at all times since 1974, at least two members of the council have been supported by a majority of black voters (*id.* at 68a).

The court rejected plaintiffs' contention that black voters did not actually favor Howell and Staylor since far more blacks voted for competing candidates than for them (Pet. App. 70a-72a). The court found it more significant that a majority of blacks voted for Howell and Staylor, that the most influential black civic group endorsed them, and that some black candidates received less black support than they did (*ibid.*).

The district court also rejected plaintiffs' assertion that only special circumstances allowed Foster to win a second black seat in 1984 (Pet. App. 76a-79a). The court acknowledged that the Mayor had both endorsed Foster and publicly stated that his election might moot this case (*id.* at 76a). The court also noted that a civic group with which the Mayor was affiliated supported only two candidates (not including Foster) when three seats were vacant (*id.* at 78a; see also *id.* at 18a). The court found, however, that these events had not produced unusual white support for Foster (*id.* at 76a-79a). The court relied on evidence that the Mayor's decision to support Foster had predated the lawsuit (*id.* at 77a). It also cited evidence that other black candidates, including one who ran in 1984 without the Mayor's endorsement, had obtained approximately the same level of white support as Foster did in 1984 (*id.* at 77a-78a).

Finally, the court rejected plaintiffs' contention that the reelection of black incumbents should be attributed to the special advantages of incumbency (Pet. App. 80a). The court found that incumbency was not critical to black success since nonincumbents supported by a majority of black voters have also won (*ibid.*).

4. a. A divided panel of the court of appeals reversed. It agreed with the district court that Norfolk blacks are sufficiently compact to constitute a voting majority in at least two single-member districts and that they are politically cohesive (Pet. App. 9a). It held that the district court had erred, however, in finding the absence of legally significant white bloc voting.

The court concluded that the district court's error stemmed in part from its finding that Howell and Staylor were minority-preferred candidates (Pet. App. 9a-15a). The appellate court held that Howell's and Staylor's receipt of significantly less minority support than competing candidates created a presumption that they should not be considered minority-preferred (*id.* at 9a-10a). The evidence cited by the district court, the Fourth Circuit explained, was insufficient to show that black voters preferred Howell and Staylor over these other unsuccessful candidates (*id.* at 11a). The court also concluded that the district court's finding could not be reconciled with the evidence that the black community did not view Howell and Staylor as their representatives and the evidence that Howell and Staylor did not promote issues of concern to the minority community (*id.* at 11a-13a).

The court of appeals then proceeded to address the significance of white bloc voting, with Howell and Staylor no longer counted as minority successes. The court found that while black voters have achieved sustained success in electing one representative, "this case involves the community's inability to elect a second member until after the institution of this action" (Pet. App. 15a). For this reason, the court explained, the statistics showing that just over half of the black-supported candidates

have won election since 1968 are misleading (*ibid.*). To use such statistics to defeat this action, the court concluded, would place "a stamp of approval on token representation" (*ibid.*).

To avoid this result, the court held that the inquiry into whether white bloc voting can usually defeat minority-preferred candidates should be applied to the black community's effort to obtain a second seat (Pet. App. 15a). Applying this analysis, the court found that all black-supported candidates for a second seat between 1968 and 1984 were defeated and that this demonstrated legally significant white bloc voting (*id.* at 16a).

A second black—Foster—was elected to the council in 1984, but the court held that this did not undermine its conclusion (Pet. App. 17a-20a). The court concluded that the Mayor's unprecedented support for a second black, his statement that the election of a second black might moot the case, and the civic coalition's endorsement of two candidates for three vacancies (leaving a more open field for Foster) showed that special circumstances accounted for Foster's success (*id.* at 18a). The court held that the district court's finding that these events had not elicited unusual white support was based on its mistaken reliance on a comparison between the amount of white support received by Foster and the amount received by previous black candidates for the *first* seat (*id.* at 18a-19a). According to the court of appeals, Foster's white support should have been compared to that of previous second-seat candidates; when this comparison was made, it became clear that Foster's share of the white vote (26.6%) was nearly twice that of the next highest black second-seat candidate prior to 1984 (14.0%) (*id.* at 19a). That another black candidate in 1984 received almost as much white support as Foster, the court concluded, reinforced the inference that this litigation had produced unusual white support for black candidates (*ibid.*).

The court also concluded that the ability of black voters to retain two blacks on the council in 1986 and 1988 resulted from special circumstances (Pet. App. 21a). The court attributed the success of black candidates in these elections to the pendency of this litigation and to the candidates' incumbency (*ibid.*).

b. Judge Chapman dissented. He agreed with the district court that Howell and Staylor were minority-preferred candidates (Pet. App. 23a-29a). The relevant question, according to Judge Chapman, was whether "the elected candidate can be *fairly* considered as a representative of the minority community and not whether such candidate is the 'most preferred'" (*id.* at 24a (emphasis in original)). Judge Chapman noted that the candidates' positions on issues of concern to the minority community "has nothing to do with vote dilution" (*id.* at 26a), and that he would give "little weight" to testimony that Howell and Staylor were not viewed as representatives of the black community (*ibid.*). Judge Chapman was also convinced that the panel's treatment of Howell and Staylor was at least implicitly related to an assumption that a candidate's race is an important factor in determining whether he is minority-preferred (*id.* at 25a-26a).

Judge Chapman further concluded that even if Howell and Staylor are not counted as minority-preferred candidates, plaintiffs failed to prove legally significant racial bloc voting (Pet. App. 30a-34a). In Judge Chapman's view, the majority improperly embraced proportional representation as a Section 2 requirement in focusing on whether blacks have achieved success in electing a second representative (Pet. App. 30a). Judge Chapman would have applied the test of usual defeat to all contests, not just to those for the second seat (*id.* at 33a). Applying this standard, Judge Chapman found that, even excluding Howell and Staylor, over half of the minority-supported candidates have been elected to office since 1968 (*id.* at 34a).

Judge Chapman also found that Foster's election in 1984 did not result from special circumstances (Pet. App. 34a-36a). In concluding otherwise, Judge Chapman stated, the majority had improperly restricted the comparison of Foster's white support to that of blacks who ran for the second seat (*id.* at 35a). In Judge Chapman's view, this comparison shares the same error as the panel's inquiry into whether blacks are able to elect someone to a second seat: it effectively establishes a right to proportional representation (*ibid.*). When compared to all black candidates, Judge Chapman noted, Foster's white support was not unusual. Beyond that, Judge Chapman concluded, the evidence that the level of white support for another black candidate in 1984 was comparable to the level of white support for Foster shows that the Mayor's endorsement of Foster did not produce unusual support for him (*ibid.*).

Finally, Judge Chapman concluded that the election of black incumbents should not be discounted as a special circumstance (Pet. App. 36a-37a). Judge Chapman read the panel as holding that when incumbents are successful and nonincumbents are not, incumbency is necessarily a special circumstance (*id.* at 36a). In Judge Chapman's view, this reasoning would turn virtually every election into one involving special circumstances (*ibid.*).

c. The court of appeals denied rehearing en banc by an equally divided vote (Pet. App. 197a).

DISCUSSION

Despite racially polarized voting patterns, black voters in Norfolk have repeatedly elected at least one representative of their choice to the city's seven-member council. The court of appeals determined, however, that black voters do not have an opportunity—absent special circumstances—to elect a second representative. Because blacks would have the potential to elect two representatives under a fairly drawn single-member district plan, the court of appeals held that the City's use of an at-

large election system dilutes black voting strength in violation of Section 2.

Petitioners contend that the court of appeals' inquiry into whether black voters have an opportunity to elect a second representative is inconsistent with *Gingles* and implicitly treats the absence of proportional representation as a violation of Section 2. They also argue that the Howell and Staylor elections and the post-lawsuit elections show that black voters not only have an opportunity to elect two representatives of their choice, but have in fact done so. Finally, they argue that the totality of the circumstances demonstrate the absence of a Section 2 violation.

These contentions, while serious, do not warrant this Court's review. Although the court of appeals' analysis is not without flaws, the court's errors, we believe, either do not affect the outcome of the case or are too closely tied to its particular facts to be of general significance. Moreover, there is no conflict among the circuits on the specific issues presented in this case. The petition for a writ of certiorari should therefore be denied.

That said, we would be remiss in failing to note that, as a general matter, the courts of appeals appear to be experiencing considerable difficulty in resolving a wide range of issues surrounding application of Section 2 of the Voting Rights Act to at-large election systems. See, *e.g.*, U.S. Amicus Br. in *Sanchez* v. *Bond*, petition for cert. pending, No. 89-353. It is not insignificant that, in addition to the Fourth Circuit in this case, another circuit has recently divided evenly en banc in such a case. *Solomon* v. *Liberty County*, No. 87-3406 (11th Cir. Apr. 5, 1990); see also *Whitfield* v. *Democratic Party*, No. 88-1953 (8th Cir. May 4, 1990) (en banc court evenly divided on Section 2 challenge to majority vote requirement). For the reasons set forth in our amicus filings, we do not believe that either this case or *Sanchez* warrants this Court's review. At the same time, most voting rights cases are, by their nature, likely to be fact-

intensive; persistent confusion and division in the circuits—even on application of governing principles to particular facts—may well call for further guidance from this Court at an appropriate time.

1. a. The court of appeals properly inquired into whether black voters have an opportunity to elect a second representative. That inquiry is not premised on the notion that Section 2 requires proportional representation, as petitioners contend. It is instead premised on the notion that an at-large system in which the evidence shows that white voters are willing to elect no more than one representative who is the choice of black voters is not immune from Section 2 scrutiny. Any contrary rule would, as stated by the court of appeals, "place[] a stamp of approval on token representation" (Pet. App. 15a). For example, a 15-member city council elected at-large in a community with a geographically compact, 49% black population cannot be exempt from Section 2 scrutiny because a single black-preferred representative is consistently elected. In the terms of the statute, the fact that the black communiy can consistently elect a single council member would hardly prove that it has the same opportunity as the majority group "to participate in the political process and to elect representatives of [its] choice." 42 U.S.C. 1973(b).

The use of a fairly drawn single-member district plan as a benchmark for measuring the effect of an at-large system on minority voting strength is at the heart of *Gingles*. There, the Court held that "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect." 478 U.S. at 50 n.17. It follows from this holding that, where the minority group challenging an at-large electoral system has shown that it is unable to elect as many representatives as it could in fairly drawn single-member districts, and where the defendant has failed to rebut this showing, a Section 2 violation can be made out. Cf. *Gingles*, 478 U.S. at 90-91 (O'Connor, J., concurring in the judgment).

The use of a single-member district plan as the benchmark for measuring undiluted voting strength is far different from a proportional representation standard. As was explained in *Gingles*, "[This standard] thus would only protect racial minority votes from diminution proximately caused by the districting plan; it would not assure racial minorities proportional representation." 478 U.S. at 51 n.17 (quotation marks and emphasis omitted). The Fourth Circuit has expressly recognized this distinction. See *McGhee* v. *Granville County*, 860 F.2d 110 (4th Cir. 1988) (rejecting a Section 2 challenge to a fairly drawn single-member district plan even though it afforded minority voters far less than proportional representation).

b. While the court of appeals properly sought to assess the opportunity of blacks to elect a second representative, it artificially narrowed its focus to contests for a second seat. A minority group's repeated success in electing one representative can be persuasive evidence that it fully participates in the electoral process and has an *opportunity* to elect a second representative as well. The force of this evidence is not necessarily dissipated by evidence that the minority group has been unsuccessful in actually *electing* a second representative. The lack of success could be explained by factors other than the unyielding resistance of whites to a second representative, such as the characteristics of a particular candidate or the circumstances surrounding a particular election. Because the court of appeals did not expressly consider all the evidence bearing on the opportunity of blacks to elect a second representative—including the unquestioned and consistent success of blacks in electing at least one representative to the council—its analysis of the "totality of circumstances" (42 U.S.C. 1973(b)) was incomplete.

It is unclear, however, that a more complete analysis would have affected the outcome of this case. The evidence shows that between 1970 and 1982, black voters made four unsuccessful attempts to elect a second black

to the council. These second-seat candidates received just 8% to 14% of the white vote, for an average of 11%. In contrast, black candidates for the first seat received between 22% and 32% of the white vote, for an average of 27% (Pet. App. 16a, 208a-217a). This wide and repeated disparity between white support for first-seat candidates and white support for second-seat candidates is significant evidence that black voters in fact did not have an opportunity to elect a second representative before the filing of this suit. Petitioners have pointed to nothing in the record about the characteristics of the second-seat candidates or the circumstances of these elections that adequately explains this white voting behavior, leaving the opposition of whites to a second black representative as the most persuasive explanation.

c. Petitioners contend that black voters have still elected more than half of their preferred candidates and that plaintiffs therefore failed to prove usual defeat as required by *Gingles*. This argument is misguided. Petitioners approach the usual defeat inquiry as if it involved nothing more than a strict mathematical count of past wins and losses, with more losses than wins being an essential element of plaintiffs' case. Petitioners' mathematical model, however, produces a distorted picture.

Under petitioners' method of calculating a minority group's opportunity to elect, there would be no violation as long as first-seat successes outnumber second-seat losses, regardless of whether the evidence undeniably shows that there is no opportunity to elect a second candidate. As the court of appeals explained, to accept such evidence as conclusive proof of the absence of a violation would "place[] a stamp of approval on token representation" (Pet. App. 15a). It *is* significant that blacks in Norfolk can elect a candidate of their choice to the city council. But there are seven members on the council, and if discriminatory voting patterns account for the inability of blacks to elect *more* than one candidate—

in the absence of special circumstances—then their success in electing *one* is no answer. If the political reality is that black voters have been relegated to a token seat, and that they have no real opportunity for increased representation, it would be inconsistent with the goals of Section 2 to mask this reality by melding first-seat and second-seat elections and concluding that there is no violation because blacks have won (consistently, for the first seat) more often than they have lost (consistently, for the second seat). Nothing in *Gingles* or common sense requires such a result.

To the contrary, as we have shown, the relevant inquiry under *Gingles* is whether blacks have an opportunity to elect a second representative. First-seat elections can inform that inquiry. When other evidence is more convincing, however, the first-seat elections can properly be discounted.

2. Petitioners contend, however, that the at-large election system does not limit black voters to token representation. In particular, they point to the elections of Howell and Staylor as evidence that blacks have elected at least two candidates of choice to the council since 1974. According to petitioners, the court of appeals plainly erred when it refused to find that Howell and Staylor were minority-preferred.

Gingles does not expressly address how to decide whether a candidate is minority-preferred. This Court's discussion of how to prove political cohesion, however, suggests the proper approach. One way to prove political cohesion, this Court held, is to show that "a significant number of minority group members usually vote for the same candidates." 478 U.S. at 56. This definition of political cohesion implies that there is no great mystery about how to identify minority-preferred candidates: they are simply those for whom a significant number of minority group members vote.

This is not to suggest that every candidate who receives more than 50% of the black vote is necessarily a candidate of choice. But Howell and Staylor did not receive bare majority support from blacks; black support for these white candidates ranged from almost 57% to approximately 73% (Pet. 4). Generally, support of these proportions should be sufficient to establish that a candidate has received bloc support and is therefore a candidate of choice.

The court of appeals concluded that Howell and Staylor were not minority-preferred primarily because competing candidates received a significantly higher percentage of the black vote and lost (Pet. App. 9a-15a). The court reasoned that black voters preferred these other candidates, rather than Howell and Staylor.[1] The flaw in this reasoning is that the candidates did not compete for only one position. Each election had at least three vacancies. Accordingly, blacks could potentially have had at least three candidates of choice. In these circumstances, it makes little sense to say that someone cannot be a candidate of choice solely because another candidate receives a significantly higher percentage of the black vote. In such multiple vacancy elections, if three candidates receive minority bloc support, it would generally seem fair to conclude that they are all candidates

---

[1] Petitioners' contention (Pet. 16 n.20, 22) that the court of appeals' opinion "seems to incorporate the notion that black voters must achieve proportional representation with *black* candidates" (Pet. 22 (emphasis in original)) is mistaken. The court of appeals expressly refrained from deciding whether the race of the candidate is significant in determining who is a "candidate of choice" of the minority group. Pet. App. 8a n.7. In fact, as Judge Chapman recognized in his dissent, the panel did not object to counting Howell as a black-preferred candidate in one of her bids for election. See Pet. App. 24a-25a. Although the portion of the court's opinion addressing the Howell and Staylor victories (*id.* at 9a-15a) does seem to rest on the assumption (incorrect, in our view) that minority voters may have only one defeated candidate of choice in a multiple-seat election, it does not rest on the assumption (also incorrect, in our view) that any candidate of choice of minority voters must be a member of the minority group.

of choice. See *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (recognizing more than one minority-preferred candidate in multiple-seat election), cert. denied, 109 S. Ct. 3213 (1989).

We nonetheless believe that there were sufficient grounds for the court of appeals' conclusion that the elections of Howell and Staylor did not demonstrate the absence of a Section 2 violation. That is because, as previously discussed, there is a clear pattern of defeat of candidates who are black and ran for a second seat between 1970 and 1982; at best, the elections of Howell and Staylor show that the minority voters had the opportunity to fill the second seat with a candidate of their choice so long as that candidate was white.[2] As we have explained in our Brief as Amicus Curiae in *Sanchez* v. *Bond*, No. 89-353, while a candidate of choice of a minority group need not be a member of that group, an electoral system that restricts the opportunity of a minority group to elect candidates of choice who are members of the group violates Section 2 (Br. 13-14). Thus, while we do not embrace the court of appeals' reasoning on this issue, its ultimate conclusion that the Howell and Staylor elections do not suggest the absence of a Section 2 violation does not warrant this Court's review.

Contrary to the contention of petitioners, there is no conflict between the decision in this case and the result reached by the Fifth Circuit in *City of Gretna*. In *Gretna*, the Fifth Circuit held that a black candidate who received 67% of the black vote and lost was a minority-preferred candidate even though two competing white candidates who may have received 70% of the

[2] As explained above (p. 11), although black candidates for the second seat received an average of just 11% of the white vote, black candidates for the first seat received an average of 27% of the white vote. It is this decline in the white vote for second-seat black candidates—a decline for which petitioners offer no explanation—that made it impossible for such candidates to be elected between 1970 and 1982.

black vote won. 834 F.2d at 502 & n.14. The court further held, however, that the success of the two white candidates did not establish the absence of legally significant white bloc voting. The court explained that "[s]ignificance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference." *Id.* at 502. As this discussion shows, the Fifth Circuit's result, although not its reasoning, is congruent with the result reached in this case; the success of blacks in electing white candidates to a second seat cannot rebut a clear showing that blacks have had no opportunity to elect black candidates to that seat.

3. Petitioners next contend that Foster's election in 1984 and the subsequent reelection of black candidates in 1986 and 1988 are sufficient to show that blacks enjoy an equal opportunity to elect candidates of their choice. This fact-bound contention does not warrant this Court's review.

a. Petitioners initially contend that the court of appeals' finding that this litigation produced unusual white support for Foster is based on an unduly restricted comparison to the white support for previous second-seat candidates. In petitioners' view, that analysis is premised on the same proportional representation standard that led the court to assess the opportunity of blacks to elect a second representative. For reasons already discussed, this criticism is misdirected. Given the propriety of the second-seat inquiry and the significant difference between white support for previous first- and second-seat candidates, the court of appeals properly compared Foster's white support to that of the previous second-seat candidates. Because Foster received significantly more white support than previous black second-seat candidates, the court plausibly viewed Foster's white support as unusual, and the district court's contrary finding as clearly erroneous.

This conclusion, however, does not exhaust the special circumstances inquiry. It is also necessary to determine whether this unusual support is an artifact of the pending litigation or whether it reflects a more permanent change in the political climate in Norfolk. The evidence on this issue is inconclusive. On the one hand, the evidence that no black candidate was elected to a second seat until after this suit was filed, together with the evidence that the Mayor publicly stated that the election of a second black might moot the case and the civic group's endorsement of only two candidates for the three open seats in 1984, suggest that Foster's unusual support was a product of the litigation. On the other hand, the evidence that the Mayor's support for Foster predated this suit, and that black voters have now elected and reelected two black representatives through three successive elections, suggest that a more permanent shift in the political climate may be at work. The rest of the evidence can plausibly support either inference (compare Pet. App. 19a with *id.* at 35a).

Accordingly, after identifying the district court's error in failing to treat Foster's support from white voters as unusual, a proper application of Rule 52 of the Federal Rules of Civil Procedure should have led the court of appeals to remand for a new finding on whether Foster's unusual support was caused by the litigation or reflected a more permanent shift in the Norfolk political climate. See *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982). Because the court of appeals purported to apply the clearly erroneous standard, however, and because the manner in which it did so does not have any importance outside of this case, the court of appeals' treatment of Foster's election does not warrant this Court's review.

b. For similar reasons, the question whether the court of appeals properly treated incumbency as a factor that contributed to the retention of two blacks on the council in 1986 and 1988 is not worthy of this Court's review. Under *Gingles*, incumbency is among the factors that

may justify a finding that the election of a minority-supported candidate is due to special circumstances. 478 U.S. at 57. The importance of incumbency in a particular case, however, is a factual issue governed by the clearly erroneous standard. Here, while it is plausible that the candidates' incumbency (along with the pendency of the litigation) explains the 1986 and 1988 ability of blacks to retain two seats on the council, it is equally plausible that blacks now enjoy an opportunity to elect a second representative of their choice to the council. They have, after all, done so in three successive elections. Accordingly, the court of appeals should not have substituted its judgment for that of the district court on this issue. Because this issue is so fact-bound and is unlikely to have any significance beyond this case, however, it too does not warrant this Court's review.[3]

4. Finally, petitioners contend that the court of appeals improperly reversed the district court's finding that the totality of the circumstances demonstrates the absence of a Section 2 violation. Here, however, the district court's ultimate finding depended on its treatment of the Howell, Staylor, and post-litigation elections. Once its findings on those elections were set aside, there was no longer any basis for the district court's ultimate finding. As petitioners contend (Pet. 28), this Court did not hold in *Gingles* that the only way a defendant may defeat a Section 2 claim is to show that one of the *Gingles* factors has not been proven. But in this case, petitioners point to no other circumstance that would justify a finding of

---

[3] Petitioners contend (Pet. 27-28) that the court of appeals improperly treated all election successes involving incumbents as special circumstances elections. While there is some ambiguity on this point, we read the court's discussion of incumbency as limited to the ability of blacks to elect and retain a second representative on the council (Pet. App. 5a, 20a-21a). There is no other way to explain the court's finding (Pet. App. 15a) that "this action would border on the frivolous" if the claim could have been defeated by showing that blacks had "the ability to elect a single candidate to the council."

no violation.[4] Thus, petitioners' argument on this issue collapses into their arguments on the other issues. For the reasons already discussed, those contentions do not warrant this Court's review.

---

[4] The *en banc* Eleventh Circuit has recently divided evenly concerning the relationship between a finding that the three *Gingles* factors were proven in a given case and an ultimate "totality of the circumstances" finding of a Section 2 violation. See *Solomon* v. *Liberty County*, No. 87-3406 (Apr. 5, 1990). The question that divided the Eleventh Circuit in *Solomon*, however, is largely irrelevant in this case. The *Solomon* court was unanimous in holding that a plaintiff can make out a Section 2 violation simply by proving the existence of the three *Gingles* factors. See slip op. 2599 (Kravitch, J., specially concurring), 2615 (Tjoflat, C.J., specially concurring). The court, however, was unable to agree on whether a defendant may rebut a showing of the existence of the three *Gingles* factors by showing that a neutral explanation, relying on objective factors, demonstrates that "the voting community is not driven by racial bias." *Id.* at 2616 (Tjoflat, C.J., specially concurring); see *id.* at 2593 n.3 (Kravitch, J., specially concurring). In this case, however, although petitioners generally assert (Pet. 28) that the Fourth Circuit did not give proper deference to the district court's "totality of the circumstances" finding, they do not assert that they proffered a neutral, non-racial explanation for the racially polarized voting in Norfolk, or that the Fourth Circuit, having found the existence of legally significant racially polarized voting, erred in failing to recognize that such voting in this case was not the result of racial bias. This case, therefore, does not raise the issue that divided the Eleventh Circuit in *Solomon*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING GORNSTEIN
Attorneys

MAY 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 914

No. 89-989

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONSE OF PETITIONERS TO THE SOLICITOR GENERAL'S AMICUS BRIEF

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
1200 Mutual Building
909 East Main Street
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
OFFICE OF THE CITY ATTORNEY
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 8
Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989) .. 3
Carrolton Branch of NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1111 (1988) 3
Citizens for a Better Gretna v. City of Gretna, La., 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989) 3
Sanchez v. Bond, 875 F.2d 1488 (10th Cir. 1989), *cert. pending*, No. 89-353 ..... 3, 4, 7
Solomon v. Liberty County, No. 87-3406 (11th Cir. April 5, 1990) 8
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*
Whitfield v. Democratic Party, No. 88-1953 (8th Cir. May 4, 1990) 8

Statutes and Rule:

Section 2 of Voting Rights Act, 42 U.S.C. § 1973 .... *passim*
Rule 52(a), Fed. R. Civ. P. 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-989

CITY OF NORFOLK, VIRGINIA, *et al.*,
Petitioners,

v.

HERBERT M. COLLINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONSE OF PETITIONERS TO THE SOLICITOR GENERAL'S AMICUS BRIEF

Compelling arguments for granting this writ are to be found in the Solicitor General's brief. The United States acknowledges that the issues raised by Petitioners are "serious" (U.S. Amicus Br. 7) and that "the court of appeals' analysis is not without flaws." *Id.* at 7-8. Specifically, the Solicitor General agreed that the court of appeals "artificially narrowed its focus to contests for a second seat" (*id.* at 10); that its "analysis of the 'totality of circumstances' . . . was incomplete" (*ibid.*); that its reasoning was "flaw[ed]" in discounting white candidates with majority black support (Mrs. Howell and Mr. Staylor) as successful candidates for a second seat (*id.* at 12); that its presumption against the inclusion of can-

didates receiving majority black support "makes little sense" and rests on an "incorrect" assumption that "minority voters may have only one defeated candidate of choice in a multiple seat election" (*id.* at 13 n.1); and that it is "plausible that blacks now enjoy an opportunity to elect a second representative of their choice to the council" and that the court of appeals "should not have substituted its judgment for that of the district court on that issue." *Id.* at 16.

Despite the numerous legal errors that the Solicitor General discerns in the majority opinion of the court of appeals, it was "unclear" to the United States that such errors necessarily made any difference in the Fourth Circuit's reversal of the District Court. Notwithstanding the District Court's findings that most black-supported candidates have usually won over two decades, most *black* black-supported candidates have usually won, and that for a decade prior to 1984, the black community had on council *two*, proportional seats consistently filled by black-supported candidates, the Solicitor General focused solely upon the opportunity of the black community to fill a second seat with a *black* representative. Although agree that Mrs. Howell and Mr. Staylor were candidates of choice of the black community who successfully filled a "second seat" and/or "third seat" between 1974 and 1984, the United States points to four black candidates between 1970 and 1982 who received majority black support, notes that these candidates received less white votes than black candidates for the "first seat" and states "petitioners have pointed to nothing in the record about the characteristics of the second-seat candidates or the circumstances of these elections that adequately explains this white voting behavior, leaving the opposition of whites to a second black representative as the most persuasive explanation." U.S. Amicus Br. 10.

The United States' analysis is legally flawed and focuses on the wrong inquiry. If, as the United States

agrees, Mrs. Howell and Mr. Staylor were clear candidates of choice of the black community for a "second seat", receiving high black support and black organizational endorsements, and defeating black candidates among black voters, then to find a violation because a *black* candidate did not fill a "second seat" does, in effect, make the race of the candidate not only a relevant, but a determinative factor in the analysis of election of candidates of choice. This position is at odds with the position taken in Justice Brennan's plurality opinion in *Thornburg v. Gingles*, 478 U.S. 30, 67 (1986), and with those courts of appeals which recognize that the race of the candidate is either irrelevant (*City of Carrolton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1557-58 (11th Cir. 1987), *cert. denied*, 108 S.Ct. 1111 (1988)), or relevant only to the question of whether to consider elections in which minority candidates do not run.[1] It raises the important question of whether a Section 2 challenge can ever be defeated unless *all* seats equal to the number of minority districts which could be created are filled by candidates of the same race.

Even if the proper focus were the opportunity to elect a second *black* candidate, the Solicitor General was wrong in ignoring those factors whose presence demonstrate that loss in particular elections is not due to a structural infirmity that lessens opportunity. Consider the following:

(1) The Solicitor General failed to take into account the closeness of the elections. Of the four instances cited by the United States of losses by black candidates in 1970 through 1982 for a "second seat," two of the races (Mr.

---

[1] *See Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989); *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S.Ct. 3213 (1989); *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. pending*, No. 89-353.

Walton's in 1970 and Mrs. Butts' in 1980) were extremely close.[2]

(2) The Solicitor General failed to take into account the role of endorsements. Without black organizational endorsement, white candidate Howell would not have defeated Mrs. Butts in 1980.[3]

(3) The Solicitor General failed to take into account other candidates in the field. In 1982, Mrs. Butts lost votes, both black and white, because two additional black candidates (Gay and Collins) ran on a Democratic Party ticket, and who, although not receiving Concerned Citizen endorsement and not receiving a majority of black votes, nevertheless drew off needed votes from Mrs. Butts. Tr. 1978; Pet. App. 209a. Mrs. Butts still came in fifth for four seats out of a fourteen candidate field.[4]

(4) The Solicitor General failed to take into account the role of name recognition. As Dr. Timothy O'Rourke testified, when Mrs. Butts' familiarity city-wide increased

---

[2] Mr. Walton running for one of six seats in 1970 lost by only 920 votes out of a turnout of 30,595. Pet. App. 215a. He ran in a field of nineteen candidates of whom four were incumbents, and all four won. In 1980, Mrs. Butts ran against eleven other candidates, including two incumbents for one of three seats, but lost by only 405 votes out of 28,638 ballots cast, coming in fourth, as the district court found. Pet. App. 68a, 210a. *See Sanchez v. Bond*, 875 F.2d at 1492-93, in which the Tenth Circuit's affirmance was based in part on close races in which Hispanics ran but lost as well as on the election of Anglo candidates preferred by Hispanics, points noted by the United States in its Amicus brief, at 15, in *Sanchez*.

[3] In 1980, the Concerned Citizens supported both Mrs. Howell and Mrs. Butts, and with that endorsement, Mrs. Howell received 72.9% of the black vote, and only 31.7% of the white vote. As undisputed testimony showed, without the black support, Mrs. Howell would have lost and Mrs. Butts would have won. Pet. App. 210a; Tr. 1977.

[4] In that same election, black candidate Joseph Green won more votes city-wide than any other candidate, black or white.

so did her white support. Tr. 1978-1979; Def.Ex. 476. With each election from 1980 through 1984, her percentage of white votes increased, and by 1984, Mrs. Butts had become a city-wide candidate whose vote distribution was almost identical to successful "first seat" black candidates Joseph Jordan and Joseph Green. Def. Ex. 476.[5]

Precisely because political opportunity can be disclosed only in the context of elections and not simply by the win/loss column, the Voting Rights Act, as this Court has emphasized, requires a "searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 45-46. By looking only to the losses by *black* candidates for a "second seat" without considering the context of those elections or considering the enormous success of minority-supported candidates overall, both black and white, the Fourth Circuit thwarted the proper application of the "totality of circumstances" analysis in determining electoral success. Certainly, the District Court was entitled to rely upon the circumstances discussed above when considering the "totality of circumstances" which demonstrated that not only do black voters have the opportunity to elect a *second* candidate of choice, but a *black* second candidate of choice. This conclusion is only reinforced further by the success of black voters in maintaining two seats on council filled by *black* candidates, from *1984*, and with the recent re-election of Joseph Green, through at least *1992*.[6]

---

[5] Her percentage of white votes was almost identical to successful black candidate John Foster who was supported by the mayor, and as the undisputed testimony disclosed, had her *black* support not dropped in 1984, she would have become the third black member of council, as the district court found. Pet. App. 70a; 154a. She received more white votes in 1984 than six other candidates. Pet. App. 208a; Tr. 1978. Mrs. Butts was a principal witness for Petitioners at trial, supporting Norfolk's at-large system. Pet. App. 181a; Tr. 1632.

[6] This Court can take judicial notice of the fact that on May 1, 1990, Joseph Green was re-elected to a four year term, receiving

In addition to the errors committed by the Fourth Circuit with regard to determining the ability of the black community to elect candidates of choice prior to 1984, the United States recognized that the Fourth Circuit also erred in its analysis of the election of a second black member to City Council in 1984 and the consistent re-election of black incumbents thereafter. U.S. Amicus Br. 15-16. The errors, according to the Solicitor General, were caused by the misapplication of the "clearly erroneous" standard under Rule 52(a), are "unlikely to have any significance beyond this case" and do not "warrant this Court's review." *Ibid.*

These errors, however, go beyond the Fourth Circuit's interpretation of the facts. In the instance of the 1984 election, the court of appeals held that the proper legal focus was *solely* upon the white support given to *black* candidates for a *second seat*, rather than all minority-supported candidates, which, as discussed above, makes the race of the candidate the determinative factor as well as improperly narrowing the focus to a second seat. Although the Solicitor General endorsed the Fourth Circuit's approach with regard to 1984 (*id.* at 15), this position is in complete contradiction to the measure the Solicitor General earlier applied to determine the opportunity to elect a second black council member between 1970 and 1982, namely, the support white voters gave the *first* seat black candidates. *Id.* at 10. The result, of course, is the creation of confusing double standards in the determination of equal opportunity.

With regard to the 1986 and 1988 elections, the Fourth Circuit treated the presence of black incumbents as a "special circumstance" without attempting to analyze, as the District Court did (App. 80a), whether or not in-

---

the second highest vote total city-wide of fourteen candidates for four seats. See official election returns in the appendix to this brief. Councilman John Foster, re-elected in 1988, does not stand for re-election until 1992.

cumbency lessened minority opportunity to elect. Presumably, the re-election of Joseph Green in May, 1990, suffers from the same fatal flaw. Thus, the result is to turn a factor such as incumbency, which conceivably could be but certainly is not necessarily a "special circumstance", into one that *automatically* eliminates minority victories. This cannot be so. This is an important legal issue which should be addressed by this Court.

Were these errors of the Fourth Circuit *only* caused by the misapplication of Rule 52(a), review by this Court still would be warranted. If, as the United States believes, most voting rights cases are "fact-intensive" and there is "persistent confusion and division in the circuits" even as to "application of governing principles to particular facts" (*id.* at 8) then the ability of a court of appeals to simply substitute its judgment for that of a district court will only exacerbate the confusion.[7] The unchecked usurpation of the district court's fact-finding role only serves to undermine "the application of the clearly-erroneous standard to ultimate findings of vote dilution [which] preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Gingles*, 478 U.S. at 79.[8]

---

[7] In its Amicus brief in *Sanchez v. Bond*, No. 89-353, the United States recommended against certiorari because there were no discerned legal errors and because the Tenth Circuit's affirmance was governed by the "clearly erroneous" standard. U.S. Amicus Br. in *Sanchez v. Bond*, 8. Here, the United States agrees that the Fourth Circuit committed legal errors *and* failed to abide by the "clearly erroneous" standard, and yet, because the issues are "fact-bound" believes it is "unlikely to have any significance beyond this case." Under that analysis, this Court should not have granted certiorari in *Thornburg v. Gingles*, 478 U.S. 30 (1986), another "fact-bound" case.

[8] This Court has never hesitated to correct a court of appeals which has overstepped its bounds under the "clearly erroneous"

In the absence of review, the incorrect legal standards applied by the Fourth Circuit remain uncorrected, only adding to confusion in the circuits. Indeed, the Solicitor General recognized that he "would be remiss in failing to note that, as a general matter, the courts of appeals appear to be experiencing considerable difficulty in resolving a wide range of issues surrounding application of Section 2 of the Voting Rights Act to at-large election systems." U.S. Amicus Br. 8. It is certainly no accident that apart from the Fourth Circuit, two others—the Eighth and the Eleventh—have recently divided evenly *en banc* on the proper interpretation of Section 2. *See Solomon v. Liberty County*, No. 87-3406 (11th Cir. April 5, 1990); *Whitfield v. Democratic Party*, No. 88-1953 (8th Cir. May 4, 1990). In the case of the Eleventh Circuit, the precise issue dividing the Court was the extent to which Voting Rights Act defendants may rebut in a challenge to an at-large system a plaintiff's demonstration of the three threshold preconditions under *Gingles*, 478 U.S. at 50-51, with evidence concerning the other Senate Report factors. That division in *Solomon* resulted in a remand to the district court with no guidance as to how to proceed.* The relationship between the three preconditions and the "totality of circumstances" test is raised directly by this case (*see*

---

standard, *see Anderson v. City of Bessemer*, 470 U.S. 564 (1985), and in an area of the law where all facts must be carefully analyzed to protect important political rights, adherence to this rule is of critical significance.

* The *per curiam* opinion notes that while "the appellants have satisfied the three *Gingles* factors . . . we are divided on the legal effect of proving these factors. Because we are divided in our interpretation of *Gingles* and Section 2 . . . we do not specifically direct the district court on how to proceed on remand. Rather, we instruct the district court to proceed in accordance with *Gingles*, giving due consideration to the views expressed by Chief Judge Tjoflat's and Judge Kravitch's specially concurring opinions." 1990 WestLaw 42135, at 4.

Pet. 28) and upon a fully developed record which presents an opportunity to resolve this and other important issues under Section 2.

On the eve of a new wave of challenges to at-large election systems based on the 1990 Census, guidance from this Court *now* is crucial on the issues of who counts as a candidate of choice in determining legally significant polarized voting and proportional representation, the relationship between legally significant polarized voting and proportional representation, how far an appellate court may go to supplant a district court's analysis of special circumstances and what is the role of the Senate Report factors in the "totality of circumstances."

No other at-large electoral system has ever been before this Court in which a district court has so completely documented the level of minority electoral success found in Norfolk and dispelled every indicium of unequal opportunity only to have a court of appeals, through use of improper legal standards, find a Section 2 violation. In the absence of review, this case will stand for the proposition that notwithstanding usual success overall by black-supported candidates over time, usual success in filling seats equal to the number of likely minority districts and minority proportion of the population, and lack of any other factors thwarting equality of opportunity, an at-large system still is violative of Section 2. In no other reported case have *all* of the Senate Report factors been found in favor of the governing body. These are the "circumstances" that "justify a finding of no violation." U.S. Amicus Br. 17. If Norfolk's electoral system cannot withstand a Section 2 challenge, few, if any, at-large systems can and the recognition by this Court that at-large systems are not *per se* illegal, *see Gingles*, 478 U.S. at 46, becomes, as a practical matter, meaningless.

Respectfully submitted,

H. BARTOW FARR, III
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

R. HARVEY CHAPPELL, JR.*
PAUL W. JACOBS, II
CHRISTIAN, BARTON, EPPS,
BRENT & CHAPPELL
1200 Mutual Building
909 East Main Street
Richmond, Virginia 23219
(804) 644-7851

PHILIP R. TRAPANI
HAROLD P. JUREN
OFFICE OF THE CITY ATTORNEY
908 City Hall Building
Norfolk, Virginia 23501
(804) 441-2871

* Counsel of Record

APPENDIX

APPENDIX

The attached five (5) city Council Election Results Sheets for the City of Norfolk is a true copy of the official results of the election held on May 1, 1990.

/s/ Betty W. Edwards
Chief Assistant Registrar

STATE OF VIRGINIA

CITY OF NORFOLK, to-wit:

I, Sandra B. Claxton, a Notary Public of the State of Virginia in and for the City aforesaid, do hereby certify that Betty W. Edwards, Chief Assistant Registrar, whose name is signed above, has acknowledged the same before me in my City and State aforesaid.

Given under my hand this 29th day of May, 1990.

/s/ Sandra B. Claxton
Notary Public

My commission expires: April 28, 1992

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK

GENERAL ELECTION
TUESDAY, MAY 1, 1990

NUMBER PRECINCT	ANDREWS	CARR	COFIELD	DOWNING	DRIVER	FRAIM	GREEN	JOHNSON	JONES	LANGHORNE	MARSHALL	PHILLIPS	ROBINSON	WASHINGTON
01	98	4	11	287	5	70	282	8	16	7	8	90	9	111
	27.22%	1.11%	3.06%	79.72%	1.39%	19.44%	78.33%	2.22%	4.44%	1.94%	2.22%	25.00%	2.50%	30.83%
02	82	3	8	382	7	58	213	4	10	7	6	89	16	175
	18.59%	0.68%	1.81%	86.62%	1.59%	13.15%	48.30%	0.91%	2.27%	1.59%	1.36%	20.18%	3.63%	39.68%
03	86	3	9	92	6	68	160	3	4	43	8	60	15	118
	41.55%	1.45%	4.35%	44.44%	2.90%	32.85%	77.29%	1.45%	1.93%	20.77%	3.86%	28.99%	7.25%	57.00%
04	294	10	20	203	12	235	384	17	9	1	16	121	22	59
	63.91%	2.17%	4.35%	44.13%	2.61%	51.09%	83.48%	3.70%	1.96%	0.22%	3.48%	26.30%	4.78%	12.83%
05	78	2	2	72	0	59	107	1	3	1	7	49	4	10
	65.55%	1.68%	1.68%	60.50%		49.58%	89.92%	0.84%	2.52%	0.84%	5.88%	41.18%	3.36%	8.40%
06	143	3	5	114	3	126	178	8	6	1	7	65	1	30
	68.75%	1.44%	2.40%	54.81%	1.44%	60.58%	85.58%	3.85%	2.88%	0.48%	3.37%	31.25%	0.48%	14.42%
07	106	5	5	116	4	79	162	5	4	4	9	85	16	39
	49.53%	2.34%	2.34%	54.21%	1.87%	36.92%	75.70%	2.34%	1.87%	1.87%	4.21%	39.72%	7.48%	18.22%
08	222	4	5	160	8	191	298	10	4	2	7	90	7	34
	63.25%	1.14%	1.42%	45.58%	2.28%	54.42%	84.90%	2.85%	1.14%	0.57%	1.99%	25.64%	1.99%	9.69%
09	58	1	4	65	6	51	96	3	0	0	6	45	6	10
	44.62%	0.77%	3.08%	50.00%	4.62%	39.23%	73.85%	2.31%			4.62%	34.62%	4.62%	7.69%
10	216	5	2	19	15	197	188	3	3	1	25	191	12	13
	81.51%	1.89%	0.75%	7.17%	5.66%	74.34%	70.94%	1.13%	1.13%	0.38%	9.43%	72.08%	4.53%	4.91%
11	241	7	7	20	10	234	216	8	3	5	29	215	15	16
	83.10%	2.41%	2.41%	6.90%	3.45%	80.69%	74.48%	2.76%	1.03%	1.72%	10.00%	74.14%	5.17%	5.52%
12	451	11	16	28	27	433	408	16	3	8	85	390	27	48
	81.70%	1.99%	2.90%	5.07%	4.89%	78.44%	73.91%	2.90%	0.54%	1.45%	15.40%	70.65%	4.89%	8.70%
13	262	2	15	23	15	233	227	9	3	4	45	224	14	22
	85.34%	0.65%	4.89%	7.49%	4.89%	75.90%	73.94%	2.93%	0.98%	1.30%	14.66%	72.96%	4.56%	7.17%

OFFICIAL RESULTS

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK

GENERAL ELECTION
TUESDAY, MAY 1, 1990

NUMBER PRECINCT	ANDREWS	CARR	COFIELD	DOWNING	DRIVER	FRAIM	GREEN	JOHNSON	JONES	LANGHORNE	MARSHALL	PHILLIPS	ROBINSON	WASHINGTON
14	176	4	6	84	4	154	211	3	3	5	10	88	11	16
	71.84%	1.63%	2.45%	34.29%	1.63%	62.86%	86.12%	1.22%	1.22%	2.04%	4.08%	35.92%	4.49%	6.53%
15	246	16	18	99	18	215	261	24	7	8	52	219	18	37
	68.72%	4.47%	5.03%	27.65%	5.03%	60.06%	72.91%	6.70%	1.96%	2.23%	14.53%	61.17%	5.03%	10.34%
16	155	9	7	37	11	146	187	12	9	2	28	135	15	28
	65.13%	3.78%	2.94%	15.55%	4.62%	61.34%	78.57%	5.04%	3.78%	0.84%	11.76%	56.72%	6.30%	11.76%
17	67	0	8	88	7	73	102	5	1	0	7	29	4	20
	52.76%		6.30%	69.29%	5.51%	57.48%	80.31%	3.94%	0.79%		5.51%	22.83%	3.15%	15.75%
18	397	3	6	26	16	361	324	8	3	4	39	374	16	15
	86.68%	0.66%	1.31%	5.68%	3.49%	78.82%	70.74%	1.75%	0.66%	0.87%	8.52%	81.66%	3.49%	3.28%
19	293	4	7	21	9	287	253	8	3	4	26	266	9	20
	83.24%	1.14%	1.99%	5.97%	2.56%	81.53%	71.88%	2.27%	0.85%	1.14%	7.39%	75.57%	2.56%	5.68%
20	406	8	11	29	30	378	339	11	3	5	55	371	23	25
	83.71%	1.65%	2.27%	5.98%	6.19%	77.94%	69.90%	2.27%	0.62%	1.03%	11.34%	76.49%	4.74%	5.15%
21	586	9	14	42	44	559	480	9	6	4	60	554	26	26
	83.24%	1.28%	1.99%	5.97%	6.25%	79.40%	68.18%	1.28%	0.85%	0.57%	8.52%	78.69%	3.69%	3.69%
22	294	12	19	39	35	269	255	19	9	15	50	262	19	20
	75.19%	3.07%	4.86%	9.97%	8.95%	68.80%	65.22%	4.86%	2.30%	3.84%	12.79%	67.01%	4.86%	5.12%
23	396	5	13	49	28	372	327	18	9	9	56	323	24	30
	84.62%	1.07%	2.78%	10.47%	5.98%	79.49%	69.87%	3.85%	1.92%	1.92%	11.97%	69.02%	5.13%	6.41%
24	361	9	17	47	38	320	303	14	14	4	90	398	35	31
	67.23%	1.68%	3.17%	8.75%	7.08%	59.59%	56.42%	2.61%	2.61%	0.74%	16.76%	74.12%	6.52%	5.77%
26	441	9	24	99	49	408	419	25	19	11	50	412	17	39
	73.87%	1.51%	4.02%	16.58%	8.21%	68.34%	70.18%	4.19%	3.18%	1.84%	8.38%	69.01%	2.85%	6.53%
27	195	1	14	25	25	185	169	14	6	3	32	184	14	27
	76.77%	0.39%	5.51%	9.84%	9.84%	72.83%	66.54%	5.51%	2.36%	1.18%	12.60%	72.44%	5.51%	10.63%

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK

GENERAL ELECTION
TUESDAY, MAY 1, 1990

NUMBER PRECINCT	ANDREWS	CARR	COFIELD	DOWNING	DRIVER	FRAIM	GREEN	JOHNSON	JONES	LANGHORNE	MARSHALL	PHILLIPS	ROBINSON	WASHINGTON
28	169	10	11	35	20	144	155	22	10	4	34	138	19	18
	69.55%	4.12%	4.53%	14.40%	8.23%	59.26%	63.79%	9.05%	4.12%	1.65%	13.99%	56.79%	7.82%	7.41%
29	114	8	4	81	11	95	132	12	4	7	21	99	21	26
	56.72%	3.98%	1.99%	40.30%	5.47%	47.26%	65.67%	5.97%	1.99%	3.48%	10.45%	49.25%	10.45%	12.94%
30	273	9	20	98	28	230	316	16	14	13	49	248	38	43
	66.26%	2.18%	4.85%	23.79%	6.80%	55.83%	76.70%	3.88%	3.40%	3.16%	11.89%	60.19%	9.22%	10.44%
31	296	14	12	87	29	275	307	14	9	6	38	216	21	31
	70.31%	3.33%	2.85%	20.67%	6.89%	65.32%	72.92%	3.33%	2.14%	1.43%	9.03%	51.31%	4.99%	7.36%
32	231	2	7	46	33	196	182	14	5	4	69	230	23	24
	72.19%	0.63%	2.19%	14.38%	10.31%	61.25%	56.88%	4.38%	1.56%	1.25%	21.56%	71.88%	7.19%	7.50%
33	194	11	13	35	35	180	148	8	7	7	76	221	28	27
	68.07%	3.86%	4.56%	12.28%	12.28%	63.16%	51.93%	2.81%	2.46%	2.46%	26.67%	77.54%	9.82%	9.47%
34	85	6	5	17	23	75	69	6	6	5	43	94	23	19
	61.15%	4.32%	3.60%	12.23%	16.55%	53.96%	49.64%	4.32%	4.32%	3.60%	30.94%	67.63%	16.55%	13.67%
35	120	7	3	15	16	105	101	8	3	5	31	124	8	15
	72.29%	4.22%	1.81%	9.04%	9.64%	63.25%	60.84%	4.82%	1.81%	3.01%	18.67%	74.70%	4.82%	9.04%
36	95	9	13	14	18	68	74	15	5	13	30	104	26	23
	66.43%	6.29%	9.09%	9.79%	12.59%	47.55%	51.75%	10.49%	3.50%	9.09%	20.98%	72.73%	18.18%	16.08%
37	133	8	10	28	17	117	112	10	7	8	35	157	18	11
	65.84%	3.96%	4.95%	13.86%	8.42%	57.92%	55.45%	4.95%	3.47%	3.96%	17.33%	77.72%	8.91%	5.45%
38	135	11	12	16	37	118	112	11	8	6	50	149	28	18
	63.98%	5.21%	5.69%	7.58%	17.54%	55.92%	53.08%	5.21%	3.79%	2.84%	23.70%	70.62%	13.27%	8.53%
39	245	15	44	71	59	220	219	22	15	7	66	268	36	38
	60.49%	3.70%	10.86%	17.53%	14.57%	54.32%	54.07%	5.43%	3.70%	1.73%	16.30%	66.17%	8.89%	9.38%
40	254	12	23	44	60	229	221	15	12	6	65	289	23	43
	64.47%	3.05%	5.84%	11.17%	15.23%	58.12%	56.09%	3.81%	3.05%	1.52%	16.50%	73.35%	5.84%	10.91%

OFFICIAL RESULTS

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK

GENERAL ELECTION
TUESDAY, MAY 1, 1990

NUMBER PRECINCT	ANDREWS	CARR	COFIELD	DOWNING	DRIVER	FRAIM	GREEN	JOHNSON	JONES	LANGHORNE	MARSHALL	PHILLIPS	ROBINSON	WASHINGTON
41	202	5	10	16	38	200	162	3	3	5	39	219	16	13
	73.99%	1.83%	3.66%	5.86%	13.92%	73.26%	59.34%	1.10%	1.10%	1.83%	14.29%	80.22%	5.86%	4.76%
42	235	6	21	238	4	203	394	14	13	15	17	214	15	41
	46.44%	1.19%	4.15%	47.04%	0.79%	40.12%	77.87%	2.77%	2.57%	2.96%	3.36%	42.29%	2.96%	8.10%
43	61	4	6	9	25	64	55	0	3	4	27	74	8	7
	62.24%	4.08%	6.12%	9.18%	25.51%	65.31%	56.12%		3.06%	4.08%	27.55%	75.51%	8.16%	7.14%
44	184	16	14	28	67	153	128	17	12	6	67	194	22	32
	67.15%	5.84%	5.11%	10.22%	24.45%	55.84%	46.72%	6.20%	4.38%	2.19%	24.45%	70.80%	8.03%	11.68%
45	79	0	4	7	28	69	59	4	2	0	21	81	8	7
	75.24%		3.81%	6.67%	26.67%	65.71%	56.19%	3.81%	1.90%		20.00%	77.14%	7.62%	6.67%
46	310	12	18	29	84	302	231	13	6	8	100	346	32	24
	68.13%	2.64%	3.96%	6.37%	18.46%	66.37%	50.77%	2.86%	1.32%	1.76%	21.98%	76.04%	7.03%	5.27%
47	329	9	22	43	53	315	286	25	8	12	72	321	28	40
	72.63%	1.99%	4.86%	9.49%	11.70%	69.54%	63.13%	5.52%	1.77%	2.65%	15.89%	70.86%	6.18%	8.83%
48	138	12	9	21	36	135	100	9	5	7	56	172	25	18
	62.16%	5.41%	4.05%	9.46%	16.22%	60.81%	45.05%	4.05%	2.25%	3.15%	25.23%	77.48%	11.26%	8.11%
49	67	1	5	16	38	70	63	3	5	4	29	85	12	15
	56.78%	0.85%	4.24%	13.56%	32.20%	59.32%	53.39%	2.54%	4.24%	3.39%	24.58%	72.03%	10.17%	12.71%
50	426	26	45	78	301	414	292	34	30	16	187	513	69	52
	55.40%	3.38%	5.85%	10.14%	39.14%	53.84%	37.97%	4.42%	3.90%	2.08%	24.32%	66.71%	8.97%	6.76%
51	240	10	19	37	143	214	175	25	12	11	95	275	50	39
	60.76%	2.53%	4.81%	9.37%	36.20%	54.18%	44.30%	6.33%	3.04%	2.78%	24.05%	69.62%	12.66%	9.87%
52	321	16	23	34	117	308	224	17	11	9	95	342	47	21
	68.30%	3.40%	4.89%	7.23%	24.89%	65.53%	47.66%	3.62%	2.34%	1.91%	20.21%	72.77%	10.00%	4.47%
53	157	16	13	25	103	143	105	14	6	8	72	156	30	27
	62.80%	6.40%	5.20%	10.00%	41.20%	57.20%	42.00%	5.60%	2.40%	3.20%	28.80%	62.40%	12.00%	10.80%

COMMONWEALTH OF VIRGINIA
CITY OF NORFOLK

GENERAL ELECTION
TUESDAY, MAY 1, 1990

NUMBER PRECINCT	ANDREWS	CARR	COFIELD	DOWNING	DRIVER	FRAIM	GREEN	JOHNSON	JONES	LANGHORNE	MARSHALL	PHILLIPS	ROBINSON	WASHINGTON
54	159	3	8	23	79	170	132	4	3	5	54	170	18	20
	62.11%	1.17%	3.13%	8.98%	30.86%	66.41%	51.56%	1.56%	1.17%	1.95%	21.09%	66.41%	7.03%	7.81%
55	204	17	21	45	150	196	162	15	12	9	86	215	43	34
	54.99%	4.58%	5.66%	12.13%	40.43%	52.83%	43.67%	4.04%	3.23%	2.43%	23.18%	57.95%	11.59%	9.16%
56	132	3	6	94	27	102	150	6	1	2	22	136	13	15
(ABSENTEE VOTERS)	52.80%	1.20%	2.40%	37.60%	10.80%	40.80%	60.00%	2.40%	0.40%	0.80%	8.80%	54.40%	5.20%	6.00%
TOTAL	11938	427	694	3596	2111	10871	11415	641	397	370	2459	11179	1143	1760
% OF RACE	66.60%	2.38%	3.87%	20.06%	11.78%	60.65%	63.68%	3.58%	2.21%	2.06%	13.72%	62.37%	6.38%	9.82%
% OF REG. VOTERS	13.67%	0.49%	0.79%	4.12%	2.42%	12.45%	13.07%	0.73%	0.45%	0.42%	2.82%	12.80%	1.31%	2.02%

CURRENTLY 55 PRECINCTS HAVE REPORTED OUT OF 55 TOTAL PRECINCTS (THERE IS NO PRECINCT # 25)
100.00% OF THE PRECINCTS HAVE REPORTED.